No. 15-1498

Title:	Jefferson B. Sessions, III, Attorney General, Petitioner v. James Garcia Dimaya
Docketed:	June 13, 2016
Linked with 15A1049	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-71307)
Decision Date:	October 19, 2015
Rehearing Denied:	January 25, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 13 2016	Application (15A1049) to extend the time to file a petition for a writ of certiorari from April 24, 2016 to May 24, 2016, submitted to Justice Kennedy.
Apr 24 2016	Application (15A1049) granted by Justice Kennedy extending the time to file until May 24, 2016.
May 13 2016	Application (15A1049) to extend further the time from May 24, 2016 to June 10, 2016, submitted to Justice Kennedy.
May 16 2016	Application (15A1049) granted by Justice Kennedy extending the time to file until June 10, 2016.
Jun 10 2016	Petition for a writ of certiorari filed. (Response due July 13, 2016)
Jun 24 2016	Order extending time to file response to petition to and including August 12, 2016.
Aug 12 2016	Brief of respondent James Garcia Dimaya in opposition filed.
Aug 31 2016	DISTRIBUTED for Conference of September 26, 2016.
Aug 31 2016	Reply of petitioner Loretta E. Lynch, Attorney General filed. (Distributed)
Sep 29 2016	Petition GRANTED.
Nov 7 2016	Motion to dispense with printing the joint appendix filed by petitioner Loretta E. Lynch, Attorney General.
Nov 14 2016	Brief of petitioner Loretta E. Lynch, Attorney General filed.
Nov 28 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 5 2016	SET FOR ARGUMENT on Tuesday, January 17, 2017.
Dec 7 2016	Record requested from the U.S.C.A. 9th Circuit.
Dec 12 2016	CIRCULATED.
Dec 12 2016	Record received from U.S.C.A. 9th Circuit is electronic.
Dec 14 2016	Brief of respondent James Garcia Dimaya filed. (Distributed)
Dec 21 2016	Brief amici curiae of Retired Article III Judges filed. (Distributed)
Dec 21 2016	Brief amici curiae of National Immigration Project of the National Lawyers Guild, et al. filed. (Distributed)
Dec 21 2016	Brief amicus curiae of The National Immigration Law Center filed. (Distributed)
Dec 21 2016	Brief amicus curiae of The National Association of Federal Defenders filed. (Distributed)
Jan 10 2017	Reply of petitioner Loretta E. Lynch, Attorney General filed. (Distributed)

Jan 17 2017	Argued. For petitioner: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent: E. Joshua Rosenkranz, New York, N. Y.
Jun 26 2017	This case is restored to the calendar for reargument.

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RECORD AND BRIEFS

15-1498

No.

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OFFICE OF THE CLERK

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 10
A. The Ninth Circuit erred in holding that Section 16(b), as applied through the removal provisions of the Immigration and Nationality Act, is unconstitutionally vague 11
B. The question presented warrants this Court's review 26
Conclusion 31
Appendix A — Court of appeals opinion (Oct. 19, 2015) 1a
Appendix B — Decision of the Board of Immigration Appeals (Apr. 22, 2011) 41a
Appendix C — Decision of the immigration judge (Nov. 1, 2010) 49a
Appendix D — Court of appeals order (Jan. 25, 2016) 56a
Appendix E — Constitutional and statutory provisions 57a

TABLE OF AUTHORITIES

Cases:

Abbott v. *United States*, 562 U.S. 8 (2010) 25
Aguilar v. *Attorney Gen.*, 663 F.3d 692 (3d Cir. 2011) 25
Arizona v. *United States*, 132 S. Ct. 2492 (2012) 12
Arriaga v. *Mukasey*, 521 F.3d 219 (2d Cir. 2008) 15
Barragan-Lopez v. *Holder*, 705 F.3d 1112 (9th Cir. 2013) 28
Begay v. *United States*, 553 U.S. 137 (2008) 19
Carachuri-Rosendo v. *Holder*, 560 U.S. 563 (2010) 3
Delgado-Hernandez v. *Holder*, 697 F.3d 1125 (9th Cir. 2012) 28

Cases—Continued: Page

Descamps v. *United States*, 133 S. Ct. 2276 (2013) 5
Evans v. *Zych*, 644 F.3d 447 (6th Cir. 2011) 23
Garcia-Meza v. *Mukasey*, 516 F.3d 535 (7th Cir. 2008) 15
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 12, 13
Hubbard, In re, No. 15-276, 2016 WL 3181417 (4th Cir. June 8, 2016) 26
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 12, 13
James v. *United States*, 550 U.S. 192 (2007) 20
Jimenez-Gonzalez v. *Mukasey*, 548 F.3d 557 (7th Cir. 2008) 25
Johnson v. *United States*, 135 S. Ct. 2551 (2015) ..... *passim*
Jordan v. *De George*, 341 U.S. 223 (1951) 7, 13, 14
Kerry v. *Din*, 135 S. Ct. 2128 (2015) 24
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 3, 10, 18, 19, 22, 23
Lisbey v. *Gonzales*, 420 F.3d 930 (9th Cir. 2005), cert. denied, 549 U.S. 868 (2006) 28
Marcello v. *Bonds*, 349 U.S. 302 (1955) 13
Mata v. *Lynch*, 135 S. Ct. 2150 (2015) 24
Mellouli v. *Lynch*, 135 S. Ct. 1980 (2015) 24
Rodriguez-Castellon v. *Holder*, 733 F.3d 847 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014) 28
Rosemond v. *United States*, 134 S. Ct. 1240 (2014) 25
Sykes v. *United States*, 564 U.S. 1 (2011) 19
Torres v. *Lynch*, No. 14-1096 (May 19, 2016), slip op. 23, 24
United States v. *Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014) 29
United States v. *Becker*, 919 F.2d 568 (9th Cir. 1990), cert. denied, 499 U.S. 911 (1991) 5

Cases—Continued: Page

United States v. *Diaz-Diaz*, 327 F.3d 410 (5th Cir.), cert. denied, 540 U.S. 889 (2003) 23
United States v. *Evans*, 333 U.S. 483 (1948) 21
United States v. *Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2016), reh'g en banc granted, 815 F.3d 189 (argued May 24, 2016) 26
United States v. *Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016) 30
United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) 22
United States v. *Lattanaphom*, CR No. 99-433, 2016 WL 393545 (E.D. Cal. Feb. 2, 2016) 30
United States v. *O'Brien*, 560 U.S. 218 (2010) 25
United States v. *Sandoval-Orellana*, 714 F.3d 1174 (9th Cir. 2013) 28
United States v. *Serafin*, 562 F.3d 1105 (10th Cir. 2009) 23
United States v. *Taylor*, 814 F.3d 340 (6th Cir. 2016) 11, 18, 20, 21, 27
United States v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) 29
United States v. *Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015) 26
Village of Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 12, 14
Watson v. *United States*, 552 U.S. 74 (2007) 25

Constitution, statutes and regulation:

U.S. Const. Amend. V (Due Process Clause) 6
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) 5
18 U.S.C. 924(e)(2)(B)(ii) 6, 18, 20

Statutes and regulation—Continued: Page

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1001(a), 98 Stat. 2136 24
Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 5048 24
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(43) 2, 16
8 U.S.C. 1101(a)(43)(F) ..... *passim*
8 U.S.C. 1101(a)(43)(G) 4
8 U.S.C. 1101(f)(8) 28
8 U.S.C. 1103(a)(1) 13
8 U.S.C. 1158(b)(2)(A)(ii) 28
8 U.S.C. 1158(b)(2)(B)(i) 28
8 U.S.C. 1226(c) 28
8 U.S.C. 1227(a) 2
8 U.S.C. 1227(a)(2)(A)(iii) 2, 11, 28
8 U.S.C. 1227(a)(2)(E)(i) 15, 28
8 U.S.C. 1228(b) 28
8 U.S.C. 1229b(a) 3
8 U.S.C. 1229b(a)(3) 3, 11, 28
8 U.S.C. 1229b(b)(1)(C) 28
8 U.S.C. 1229c(b)(1)(C) 28
8 U.S.C. 1326 29
8 U.S.C. 1326(b)(2) 16
8 U.S.C. 1427(a)(3) 28
8 U.S.C. 155(a) (1940) 14
18 U.S.C. 16 ..... 15, 23, 29
18 U.S.C. 16(b) ..... *passim*
18 U.S.C. 25(a)(1) 29
18 U.S.C. 119(b)(3) 29

Statutes and regulation—Continued: Page

18 U.S.C. 842(p)(2) 29
18 U.S.C. 844(*o*) 30
18 U.S.C. 922(g)(1) 6
18 U.S.C. 922(g)(9) 25
18 U.S.C. 924(c) 27, 30
18 U.S.C. 924(c)(3) 30
18 U.S.C. 924(c)(3)(B) 11, 24, 27, 30, 31
18 U.S.C. 929(a)(1) 29
18 U.S.C. 931(a)(1) 29
18 U.S.C. 1028(b)(3)(B) 30
18 U.S.C. 1039(e)(1) 29
18 U.S.C. 1952(a) 30
18 U.S.C. 1956(c)(7)(B)(ii) 29
18 U.S.C. 1959(a)(4) 30
18 U.S.C. 2250(d) 30
18 U.S.C. 2255 27
18 U.S.C. 2261(a) 30
18 U.S.C. 3142(f) 30
18 U.S.C. 3181(b)(1) 29
18 U.S.C. 3559(f) 30
18 U.S.C. 3561(b) 30
18 U.S.C. 3663A(c)(1)(A)(i) 29
18 U.S.C. 4042(b)(3)(B) 30
Cal. Penal Code (West 1999):
§ 459 4
§ 460(a) 4
8 C.F.R. 1003.1(a)(1) 3

In the Supreme Court of the United States

No.

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 803 F.3d 1110. The opinion of the Board of Immigration Appeals (App., *infra*, 41a-48a) and the order of the immigration judge (App., *infra*, 49a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2015. A petition for rehearing was denied on January 25, 2016 (App., *infra*, 56a). On April 24, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 24, 2016. On May 16, 2016, Justice

Kennedy further extended the time to June 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 57a-62a.

STATEMENT

An immigration judge determined that respondent, an alien, is removable from the United States and is ineligible for the discretionary relief of cancellation of removal because his two state-court convictions for first-degree burglary each qualify as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* App., *infra*, 49a-55a. The Board of Immigration Appeals (Board) dismissed respondent's appeal. *Id.* at 41a-48a. The Ninth Circuit granted respondent's petition for review on the ground that the relevant portion of the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 1a-40a. The Ninth Circuit remanded the case to the Board for further consideration of respondent's request for cancellation of removal. *Id.* at 20a.

1. The INA specifies classes of aliens who are removable from the United States on the order of the Attorney General. 8 U.S.C. 1227(a). One such class comprises any alien convicted of an "aggravated felony" after admission into the United States. 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines "aggravated felony" to include certain categories of offenses. 8 U.S.C. 1101(a)(43). As particularly relevant here, one category includes any "crime of violence (as defined in sec-

tion 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted).

Section 16 of Title 18 is the general definition of "crime of violence" for the federal criminal code. As relevant here, Subsection (b) defines "crime of violence" to include "any * * * offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court held that, because Section 16 "directs [its] focus to the 'offense' of conviction," *id.* at 7, courts must employ the familiar "categorical" approach to determine whether a particular offense meets the statutory definition. See *ibid.* Under that approach, a court must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the individual's] crime." *Ibid.* *Leocal* construed Section 16(b) to encompass offenses that "naturally involve a person acting in disregard of the risk that physical force might be used against another in committing [the] offense." *Id.* at 10.

The Attorney General may cancel removal for certain lawful permanent residents (LPRs). 8 U.S.C. 1229b(a). That discretionary authority has been delegated to the Board. 8 C.F.R. 1003.1(a)(1). The INA, however, prohibits the Attorney General from cancelling the removal of an LPR who has been convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3); see *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010).

2. Respondent is a native of the Philippines who was admitted to the United States in 1992 as an LPR.

App, *infra*, 2a. In both 2007 and 2009, respondent was convicted of first-degree residential burglary in violation of California law. *Ibid.*; see Cal. Penal Code §§ 459, 460(a) (West 1999). Each time he was sentenced to two years in prison. App., *infra*, 2a.

In 2010, the Department of Homeland Security (DHS) initiated a removal proceeding against respondent. App., *infra*, 42a. DHS charged that respondent is removable because, in addition to other reasons not relevant here, his two residential-burglary convictions each qualify as an "aggravated felony" under the INA. See *id.* at 42a-43a. DHS maintained that California first-degree burglary satisfies two alternative subsections of the INA's definition of "aggravated felony": the "crime of violence" provision discussed above, 8 U.S.C. 1101(a)(43)(F), and a provision defining "aggravated felony" to include "a theft offense * * * or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (footnote omitted).

An immigration judge sustained DHS's charge of removability and ordered that respondent be removed from the United States. App., *infra*, 49a-55a. The judge concluded that respondent's burglary convictions qualify as "aggravated felon[ies]" under both subsections cited by DHS and thus render respondent removable and ineligible for cancellation of removal. See *id.* at 53a-54a.

The Board dismissed respondent's appeal. App., *infra*, 41a-48a. The Board first concluded, contrary to the ruling of the immigration judge, that first-degree burglary under California law does not qualify as a "theft offense * * * or burglary offense" under 8 U.S.C. 1101(a)(43)(G). App., *infra*, 45a. The Board

stated that California burglary does not meet the definition of generic burglary (a requirement under Board precedent), because "[t]he California statute does not require an unlawful entry." *Ibid.*

The Board determined, however, that first-degree burglary under California law does qualify as a "crime of violence" under Section 16(b) and therefore as an "aggravated felony" under the INA. App., *infra*, 45a-46a. Relying on *United States* v. *Becker*, 919 F.2d 568 (9th Cir. 1990), cert. denied, 499 U.S. 911 (1991), the Board explained that first-degree burglary "is an offense that by its nature carries a substantial risk of the use of force." App., *infra*, 46a. The Board therefore agreed with the immigration judge that respondent is removable and is ineligible for cancellation of removal. *Id.* at 46a-47a.

Board Member Wendtland concurred in the result. App., *infra*, 47a-48a. She believed that a burglary offense that does not require an unlawful entry does not meet Section 16(b)'s definition of "crime of violence" because it "does not create a sufficient risk of the use of force." *Id.* at 48a. But she interpreted *Becker* to hold that California first-degree burglary does require an unlawful entry. *Ibid.*[1]

3. Respondent filed a petition for review of the Board's order in the Ninth Circuit.

a. While the petition for review was pending, this Court decided *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). *Johnson* held that one part of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), is unconstitu-

[1] This Court later concluded that "generic unlawful entry is not an element" of the California burglary statute at issue here. *Descamps* v. *United States*, 133 S. Ct. 2276, 2293 (2013).

tionally vague. Under the ACCA, a defendant convicted of being a felon in possession of a firearm, see 18 U.S.C. 922(g)(1), who has three or more convictions for a "violent felony" or "serious drug offense" is subject to a minimum sentence of 15 years of imprisonment. The ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court had previously construed the so-called "residual clause" of that definition (*i.e.*, the clause beginning with "otherwise") to require a court to determine whether the "ordinary case" of a given predicate offense presents the requisite risk of injury, as opposed to whether the defendant's particular conduct underlying his conviction entailed such a risk. See *Johnson*, 135 S. Ct. at 2557.

Johnson held that the ACCA's residual clause violates the Due Process Clause's "prohibition of vagueness in criminal statutes" because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2556-2557. The Court concluded that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Ibid.* First, the clause requires courts not only to discern the "ordinary case" of the offense and determine whether the "physical acts that make up the crime will injure someone," but also to evaluate the risk that injury might occur *after* the commission of the offense—a "speculative" inquiry that is "detached from statutory elements," *id.* at

2557-2558, and could encompass injury "remote from the criminal act," *id.* at 2559. Second, the Court explained, the residual clause is unclear about what level of risk qualifies as a "serious potential risk," especially because the word "otherwise" indicates that the level of risk must be interpreted in light of the four preceding enumerated offenses, which are "far from clear in respect to the degree of risk each poses." *Id.* at 2558 (citation and internal quotation marks omitted). The Court then "confirm[ed] [the residual clause's] hopeless indeterminacy" by pointing to its own "repeated attempts and repeated failures to craft a principled and objective standard" over the course of five cases, *id.* at 2558, and the "numerous splits among the lower federal courts, where [the clause] has proved nearly impossible to apply consistently," *id.* at 2560 (citation and internal quotation marks omitted).

b. The Ninth Circuit ordered supplemental briefing in this case on the effect of *Johnson*. In a divided decision, the court then granted respondent's petition for review, holding that the definition of "crime of violence" in Section 16(b), as incorporated into the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 1a-40a.

i. The majority opinion, authored by Judge Reinhardt and joined by Judge Wardlaw, first concluded that "[a]though most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation." App., *infra*, 5a; see *id.* at 5a-7a. In reaching that conclusion, the court relied on this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), which it interpreted to "explicitly reject[]

the argument that the vagueness doctrine d[oes] not apply" to civil removal statutes. App., *infra*, 6a.

ii. The Ninth Circuit then held that, in light of this Court's analysis of the ACCA's residual clause in *Johnson*, Section 16(b) is unconstitutionally vague. App., *infra*, 8a-19a. The court explained that both Section 16(b) and the ACCA's residual clause require a court to determine whether a certain degree of risk is posed by the "ordinary case" of the commission of a predicate offense. *Id.* at 8a-9a. On that basis, the court concluded that Section 16(b) suffers from "the same combination of indeterminate inquiries" as the ACCA's residual clause: *i.e.*, uncertainty about how to gauge the risk posed by an offense and uncertainty about how much risk is necessary for an offense to meet the statutory definition. *Id.* at 10a; see *id.* at 11a-14a.

The government had pointed to textual differences between Section 16(b) and the ACCA's residual clause, but the Ninth Circuit found those differences immaterial. See App., *infra*, 14a-19a. The government explained, for example, that Section 16(b) on its face requires the risk to arise "in the course of committing the offense," 18 U.S.C. 16(b), whereas the ACCA's residual clause requires courts to "go[] beyond evaluating the chances that the physical acts that make up the crime will injure someone" and ask whether a risk of physical injury might occur after the offense is committed, *Johnson*, 133 S. Ct. at 2557; see *id.* at 2257-2558. The Ninth Circuit deemed that difference irrelevant to *Johnson*'s holding, see App., *infra*, at 17a, and also expressed doubt that Section 16(b) is limited to risks that occur in the course of

committing the acts that constitute the offense, despite its text, *id.* at 16a.

The government further explained that *Johnson* had found that the uncertainty as to the level of risk required under the ACCA's residual clause was magnified by the inclusion of the four preceding enumerated offenses, see 135 S. Ct. at 2558, but Section 16(b) does not contain such "a confusing list of examples," *id.* at 2561 (internal quotation marks omitted). The Ninth Circuit, however, was of the view that *Johnson*'s discussion of the four enumerated offenses was not necessary to its holding. App., *infra*, 15a-16a.

Finally, the Ninth Circuit dismissed the fact that, unlike the residual clause in *Johnson*, Section 16(b) has not generated widespread confusion among lower courts and has not been subject to "repeated attempts and repeated failures" by this Court "to craft a principled and objective standard" from the statutory text, *Johnson*, 135 S. Ct. at 2558. See App., *infra*, 18a-19a. The Ninth Circuit declined to attach significance to the Court's failure to grant review in cases under Section 16(b), noting that this Court has granted review in more criminal cases than immigration cases in recent years. See *id.* at 18a-19a & n.16.

Accordingly, the Ninth Circuit held that Section 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. App., *infra*, 20a. The court added that its decision did "not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F)." *Id.* at 20a n.17. The Ninth Circuit remanded the case to the Board for further proceedings consistent with its opinion. *Id.* at 20a.

iii. Judge Callahan dissented. App., *infra*, 20a-40a. She concluded that Section 16(b), "as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of th[e] shortcomings" that this Court identified in the text of ACCA's residual clause. *Id.* at 21a; see *id.* at 37a-38a. She noted in particular that this Court has already found Section 16(b) amenable to statutory construction in *Leocal*, *supra*, in which the Court concluded that burglary is "'the classic example' of a crime covered by [Section] 16(b)." App., *infra*, 37a (quoting *Leocal*, 543 U.S. at 10). "The Supreme Court," she wrote, "will be surprised to learn that its opinion in *Johnson* rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal*," and she anticipated that "the Supreme Court will have to intervene to return us to our proper orbit." *Id.* at 39a-40a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's divided decision held unconstitutional, as impermissibly vague, a portion of the federal criminal code's definition of "crime of violence" as applied to removal proceedings through the Immigration and Nationality Act's definition of "aggravated felony." That definition of "crime of violence" has been in place for over thirty years and is incorporated into numerous provisions of the INA and criminal statutes. The Ninth Circuit reached its holding only by declaring immaterial the fact that 18 U.S.C. 16(b) lacks particular textual features that this Court found critical to its conclusion in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague. The Ninth Circuit further disregarded the fact that, because of those textual differences, Section 16(b) has not gener-

ated the widespread confusion and interpretive failures that led this Court to invalidate the ACCA's residual clause.

The exceptional importance of the question of Section 16(b)'s constitutionality alone warrants this Court's review. Moreover, the Ninth Circuit's decision conflicts with the Sixth Circuit's decision in *United States* v. *Taylor*, 814 F.3d 340 (2016), which upheld against a vagueness challenge a definitional provision located at 18 U.S.C. 924(c)(3)(B) that is worded in a materially identical manner. Accordingly, this Court's review is warranted.

A. The Ninth Circuit Erred In Holding That Section 16(b), As Applied Through The Removal Provisions Of The Immigration And Nationality Act, Is Unconstitutionally Vague

The Ninth Circuit erred in concluding that this Court's decision in *Johnson* compels the conclusion that Section 16(b), as applied to removal proceedings under the INA through 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague.

1. As an initial matter, the Ninth Circuit mistakenly applied the vagueness standard appropriate for criminal laws to civil statutes governing removal.

a. The Ninth Circuit applied what it understood to be *Johnson*'s vagueness analysis to provisions of the INA governing whether respondent is removable from the United States and whether he is eligible for certain forms of discretionary relief from removal. 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3); see 8 U.S.C. 1101(a)(43)(F). But *Johnson*'s holding rested on the constitutional "prohibition of vagueness in *criminal statutes*," 135 S. Ct. at 2556-2557 (emphasis added), whereas removal "has been consistently classified as a

civil rather than a criminal procedure," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). In its vagueness precedents, this Court has long drawn a firm distinction between criminal and civil provisions. As the Court has explained, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). This Court has "expressed greater tolerance of enactments with civil rather than criminal penalties" in addressing vagueness challenges, at least where the civil consequences do not threaten "the right of free speech or of association" or another substantive constitutional guarantee. *Id.* at 498-499.

Thus, provisions of the INA governing removal should be subject to a less exacting form of vagueness doctrine than the sentencing statute at issue in *Johnson*, just as removal proceedings are not subject to the panoply of procedural requirements that attend criminal trials. The Ninth Circuit's contrary approach is irreconcilable with the basic character of federal immigration law. In keeping with the constitutionally central role of the Executive on questions of foreign relations and immigration, Congress has vested the Executive Branch with substantial interpretive authority and discretion to make case-by-case judgments. See, *e.g.*, *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Statutes governing removal determinations therefore are not subject to the same vagueness standard as statutes defining crimes or setting out criminal punishments.

Moreover, the twin concerns that undergird the vagueness doctrine—"giv[ing] ordinary people fair notice of the conduct" that is the subject of the law and avoiding "arbitrary enforcement," *Johnson*, 135 S. Ct. at 2556 (citation omitted)—are implicated to a far lesser degree by civil removal proceedings than by criminal prosecutions. Unlike criminal statutes, removal statutes are not subject to the constitutional prohibition on *ex post facto* laws. *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955); *Harisiades*, 342 U.S. at 594-595. Thus, for example, this Court has upheld the removal of an alien based on a conviction for an offense that "was not ground for deportation at the time he committed the offense." *Marcello*, 349 U.S. at 314. In addition, the Board of Immigration Appeals, on behalf of the Attorney General, can render authoritative interpretations of provisions of the INA concerning removability and eligibility for relief from removal to govern administrative enforcement. See *Aguirre-Aguirre*, 526 U.S. at 424-425; see also 8 U.S.C. 1103(a)(1). And because removal decisions by immigration judges also often entail case-by-case exercises of discretion, such as in the granting of relief from removal, immigration law necessarily tolerates more potential for disuniformity in that respect than would be permissible when courts adjudicate the meaning of a criminal statute.

b. In concluding that the same vagueness analysis applies to both criminal statutes and civil removal statutes, the Ninth Circuit relied principally on this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951). *Jordan* construed a statute providing for the deportation of an alien sentenced more than once to a term of imprisonment of at least one year for "any

crime involving moral turpitude." *Id.* at 225 (quoting 8 U.S.C. 155(a) (1940)); see App., *infra*, 5a-7a. The Court held that the statute encompassed the offense of conspiracy to defraud the United States of taxes on distilled spirits. 341 U.S. at 223-224, 229. Responding to an argument raised by the dissent but not argued by the parties, the Court went on to consider whether "the phrase 'crime involving moral turpitude' lacks sufficiently definite standards to justify this deportation proceeding and [whether] the statute [at issue was] therefore unconstitutional for vagueness." *Id.* at 229. The Court noted that "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct" and "emphasized that this statute does not declare certain conduct to be criminal," but it elected to "examine the application of vagueness doctrine to this case * * * in view of the grave nature of deportation." *Id.* at 230-231 (citations omitted). The Court ultimately concluded that the phrase "crime involving moral turpitude" was sufficiently definite in that context to satisfy due process. *Id.* at 232.

Jordan did not have occasion to decide whether the same vagueness standard that governs criminal statutes also governs statutes applied in civil removal proceedings. Rather, the Court's brief discussion of the vagueness question merely held that the deportation statute at issue was constitutional without extensively analyzing doctrinal questions that had not been briefed. *Jordan* therefore does not cast doubt on the proposition that the Constitution tolerates a lesser "degree of vagueness," *Village of Hoffman Estates*, 455 U.S. at 498, for criminal statutes than for laws with only civil consequences.

The Ninth Circuit also asserted that "[s]everal" other circuits had "entertained" challenges to immigration statutes on vagueness grounds, citing two published opinions from other circuits and one non-precedential opinion. App., *infra*, 7a-8a n.4. One of the precedential opinions merely recited *Jordan*'s holding that the phrase "crime involving moral turpitude" is not unconstitutionally vague, see *Garcia-Meza* v. *Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008), while the other recognized that "[t]he 'void for vagueness' doctrine is chiefly applied to criminal legislation," and that "[l]aws with civil consequences receive less exacting vagueness scrutiny," *Arriaga* v. *Mukasey*, 521 F.3d 219, 222-223 (2d Cir. 2008); cf. *ibid.* (reserving question whether INA provision rendering removable any alien convicted of stalking, 8 U.S.C. 1227(a)(2)(E)(i), "should be assessed as a civil or criminal statute"). Neither decision supports the view that a vagueness challenge to a civil statute enacted by Congress to provide for the removal of aliens from the United States should be analyzed the same way as a vagueness challenge to a criminal provision.

c. The civil removal statutes at issue here incorporate 18 U.S.C. 16, a definitional provision of the federal criminal code, and it is the text of Section 16(b) that the Ninth Circuit found to be unconstitutionally vague. That does not mean, however, that the vagueness standard appropriate for criminal statutes applies here. Congress could have adopted precisely the same statutory regime by reproducing the text of Section 16 verbatim in the INA's definition of "aggravated felony." The fact that Congress chose the statutory shortcut of cross-referencing Section 16 rather than reproducing its text does not change the fact that

in this context the statutory language operates as a civil provision, not as the definition of a criminal offense or as a criminal-penalty provision.[2]

d. Accordingly, even if the Ninth Circuit were correct that Section 16(b) suffers from the same infirmities as the ACCA's residual clause (but see pp. 17-26, *infra*), the court was incorrect to hold that the section would be unconstitutional as applied through the INA's civil provisions governing removal. The Ninth Circuit should have instead deferred to Congress's authority to draft broadly worded immigration provisions that recognize the substantial, constitutionally grounded role and discretion of the Executive Branch in that area. To be sure, it may be that a provision governing removability could be so opaque that it approaches the outer limits of what due process would permit, even in the special context of immigration. But Section 16(b) is not close to that line. The ACCA's residual clause, after all, presented a close vagueness question under the standard appropriate for criminal statutes, because this Court had twice rejected vagueness challenges to the residual clause and was divided on the question in *Johnson*. See 135 S. Ct. at 2562. It necessarily follows that Section 16(b) is not unconstitutionally vague under the standard appropriate for civil provisions enacted pursuant to Congress's plenary power over immigration.

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[2] The INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43), itself has criminal applications. See 8 U.S.C. 1326(b)(2). But Section 1101(a)(43) operates primarily as part of civil immigration law and is applied here in the removal context, and so should not be subject here to the vagueness standard appropriate for criminal laws.

2. Even if the same vagueness standard that governs criminal statutes applied here, Section 16(b) would not be unconstitutionally vague. Section 16(b) lacks the textual features that *Johnson* identified as critical to the conclusion that the ACCA's residual clause is unconstitutionally vague. And because of its very different text, Section 16(b) has not suffered from the same history of confusion and interpretive failures as the ACCA's residual clause.

a. *Johnson* held that the ACCA's residual clause is too indeterminate to be fairly applied because of the combination of two flaws in the statute: (i) "grave uncertainty about how to estimate the risk posed by a crime" and (ii) "uncertainty about how much risk" is required to meet the statutory standard. 135 S. Ct. at 2557-2558. Neither problem is present to remotely the same degree in Section 16(b).

i. The Ninth Circuit interpreted *Johnson* to hold that the ACCA's residual clause left "grave uncertainty" about how to determine the risk posed by a given offense solely because the residual clause, like Section 16(b), requires an "ordinary case" analysis. That was error.

It is true that *Johnson* identified the "ordinary case" analysis as part of what contributed to the uncertainty about how to conduct the ACCA risk assessment. 135 S. Ct. at 2557. But *Johnson*'s holding further rested on the fact that the ACCA "ordinary case" analysis "goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" and requires a court to determine whether a "risk of injury arises because the [offender] might engage in violence *after*" completing the offense, *ibid.*, and thus encompasses physical injury

"remote from the criminal act," *id.* at 2559. "Critically," the Court stated, "picturing the criminal's behavior is not enough" under the ACCA's residual clause, because "assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out"—a "speculative" inquiry "detached from statutory elements." *Id.* at 2557-2558. Thus, as the Sixth Circuit has explained, the fact that the residual clause's "language * * * did not limit a court's inquiry to the elements of the crime" was a feature of the statute that "made a difference in *Johnson*." *Taylor*, 814 F.3d at 377.

Section 16(b), by contrast, expressly requires courts to focus on the "risk that physical force * * * may be used *in the course of committing the offense*." 18 U.S.C. 16(b) (emphasis added). And in authoritatively construing Section 16(b) in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court stated that the statute refers to "the risk that physical force might be used against another *in committing an offense*." *Id.* at 10 (emphasis added).[3] Section 16(b) thus lacks the textual feature that *Johnson* deemed "[c]ritical[]" to its conclusion that the ACCA's residual clause leaves "grave uncertainty" about how to measure the risk posed by a particular offense, 135 S. Ct. at 2557.

The Ninth Circuit, moreover, ignored another feature of Section 16(b) that further narrows the risk inquiry. While the ACCA's residual clause refers the "risk of physical *injury* to another," 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added), Section 16(b) refers

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[3] Section 16(b) encompasses any felony that by its nature involves a substantial risk that physical force will be used against the "property of another" as well as against the person of another.

to the "risk that physical *force* against the person or property of another may be *used*," 18 U.S.C. 16(b) (emphases added). In holding that drunk-driving offenses do not fall under Section 16(b), *Leocal* construed Section 16(b) to focus exclusively on the risk that the offender might resort to force in completing the offense and therefore to exclude the risk of injuries resulting from "accidental or negligent conduct." 543 U.S. at 10-11. And the Court expressly noted that Section 16(b) is narrower in that respect than the standard set forth in the ACCA's residual clause. See *id.* at 10 n.7 (discussing sentencing guideline modeled on the ACCA definition). That distinctive feature of Section 16(b) serves to further refine the "ordinary case" analysis in this context.

Those textual differences have real consequences for the clarity of interpreting Section 16(b). For example, the question whether drunk-driving offenses fall under the ACCA's residual clause divided this Court three ways, see *Begay* v. *United States*, 553 U.S. 137 (2008), and led to the adoption of a legal test that the Court later substantially narrowed, see *Johnson*, 135 S. Ct. at 2559 (discussing *Sykes* v. *United States*, 564 U.S. 1, 12-13 (2011)). By contrast, this Court concluded in *Leocal* that drunk-driving offenses do not fall under Section 16(b) in two pages of a unanimous opinion that has never been called into question. See 543 U.S. at 10-11. And that decision rested on the particular language of Section 16(b)—the "use[]" of "physical force" in "the course of committing the offense"—that is not present in the ACCA.

ii. The second textual feature of the ACCA's residual clause that *Johnson* found to contribute to its indeterminacy was "uncertainty about how much risk"

is required to meet the statutory standard of a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). 135 S. Ct. at 2557-2558. *Johnson* first noted that the ACCA's residual clause differs from many other criminal statutes that include a general risk standard because the ordinary-case analysis requires a court to apply the risk standard to an understanding of a typical case, not "real-world facts." *Id.* at 2558. Section 16(b) is similar to that extent. But *Johnson* further explained that "[b]y asking whether the crime '*otherwise* involves conduct that presents a serious potential risk,' * * * the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Ibid.* Because those offenses are each so different in the degree of risk they pose, the Court concluded that the residual clause entails too much "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Ibid.*; see *id.* at 2561.

Section 16(b), however, "does not complicate the level-of-risk inquiry by linking the 'substantial risk' standard, through the word otherwise, 'to a confusing list of examples.'" *Taylor*, 814 F.3d at 377 (quoting *Johnson*, 135 S. Ct. at 2561). Consequently, Section 16(b) "does not require analogizing the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosives," *ibid.*—a facet of the ACCA risk analysis that this Court had struggled with since its first residual-clause decision. See *Johnson*, 135 S. Ct. at 2558 (discussing *James* v. *United States*, 550 U.S. 192 (2007)).

The Ninth Circuit dismissed the significance of that distinction between Section 16(b) and the ACCA's residual clause only by misreading *Johnson*. App., *infra*, 15a-16a. The Ninth Circuit incorrectly stated that *Johnson* "cited" the residual clause's four enumerated crimes "after the Court set forth its holding," and only "in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term 'serious potential risk.'" *Id.* at 15a (quoting *Johnson*, 135 S. Ct. at 2561). In actuality, *Johnson* extensively discussed the four enumerated crimes as a feature contributing to the residual clause's vagueness from the outset of its analysis, not only in responding to the government's argument about other criminal statutes. See 135 S. Ct. at 2557-2558.

iii. As Judge Callahan suggested in dissent, the Ninth Circuit majority's textual analysis essentially rested on the proposition that any risk-based statute that requires an "ordinary case" analysis is *ipso facto* unconstitutional. See App., *infra*, 21a. But *Johnson* did not articulate such a blanket rule. Instead, *Johnson* engaged in a close analysis of multiple textual features of the ACCA's residual clause. And the Court ultimately concluded that although "[e]ach of the uncertainties in the residual clause may be tolerable in isolation," it was "'*their sum* [that made] a task for us which at best could be only guesswork.'" 135 S. Ct. at 2560 (quoting *United States* v. *Evans*, 333 U.S. 483, 495 (1948)) (emphasis added); see *Taylor*, 814 F.3d at 378 ("*Johnson* did not invalidate the ACCA residual clause because the clause employed an ordinary case analysis, but rather because of a greater

sum of several uncertainties."). Given that many of the features that *Johnson* found problematic are not present in Section 16(b)—with the effect of narrowing and clarifying the inquiry called for by that statute—the Ninth Circuit erred in holding that Section 16(b) "suffers from the same indeterminacy as ACCA's residual clause," App., *infra*, 2a.

b. The Ninth Circuit further erred in disregarding the other critical factor in *Johnson*'s holding: the "failure of 'persistent efforts . . . to establish a standard'" for applying the ACCA's residual clause, which "provide[d] evidence of vagueness." 135 S. Ct. at 2558 (quoting *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)); see *id.* at 2558-2560; cf. *id.* at 2562-2563. *Johnson* placed significant weight on this "Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause" over the course of five cases. *Id.* at 2558. And it emphasized that "[t]he clause has created numerous splits among the lower federal courts, where it has proved nearly impossible to apply consistently." *Id.* at 2560 (internal quotation marks omitted).

Section 16(b) has not suffered from any comparable history of confusion and abortive interpretive efforts. This Court has heard one case on Section 16(b)—and it was unanimous. See *Leocal*, *supra*. That is likely because predicate offenses that produced circuit conflicts in the ACCA context—such as possession of a short-barreled shotgun (the offense in *Johnson* itself) or similar offenses—have not produced similarly pervasive conflicts in the Section 16(b) context. Rather, courts have had little trouble concluding that such offenses do not fall under Section 16(b), especially in

the wake of this Court's decision in *Leocal*. See *Evans* v. *Zych*, 644 F.3d 447, 452-453 (6th Cir. 2011); see also *United States* v. *Serafin*, 562 F.3d 1105, 1115-1116 (10th Cir. 2009); *United States* v. *Diaz-Diaz*, 327 F.3d 410, 413-414 (5th Cir.), cert. denied, 540 U.S. 889 (2003).

That is no coincidence. Rather, it is the direct result of the distinct textual features of Section 16(b) that make the judicial task substantially simpler and clearer than the inquiry under the ACCA's residual clause. For example, the difficult statutory question posed in *Johnson* was "how remote" the possible physical injury could be from the basic act of possession of a short-barreled shotgun—*i.e.*, whether a court should consider "the possibility that the person possessing the shotgun will later use it to commit a crime." *Johnson*, 135 S. Ct. at 2559; compare *id.* at 2565-2566 (Thomas, J., concurring in the judgment); with *id.* at 2582-2584 (Alito, J., dissenting). No such inquiry is required under Section 16(b), which turns on the risk that "the use of physical force * * * might be required in committing [the] crime." *Leocal*, 543 U.S. at 10. It is not likely that the use of physical force against another person or another person's property would be required in committing the offense of simple possession of a short-barreled shotgun. And unsurprisingly, every court of appeals to consider the question since *Leocal* has held that possession of a short-barreled shotgun and similar offenses are not "crimes of violence" under Section 16(b) or materially identical statutory language. See pp. 22-23, *supra*; cf. *Torres* v. *Lynch*, No. 14-1096 (May 19, 2016), slip op. 13 (observing that 18 U.S.C. 16, as incorporated into the INA's aggravated-felony provision, "would not

reach felon-in-possession laws and other [federal] firearms offenses").

The Ninth Circuit gave no weight to the fact that Section 16(b) has not produced anything close to the same cacophony of conflicting judicial decisions as the ACCA's residual clause and thus has not prompted this Court to grant certiorari to resolve a conflict except in *Leocal*. Instead, the Ninth Circuit attributed the dearth of decisions to this Court's asserted preference for criminal cases over immigration cases. See App., *infra* at 16a-17a & n.14.

There is no merit to that view. In fact, this Court does frequently grant certiorari to resolve circuit conflicts in the area of immigration law; the Court heard four such cases in the last two Terms. See *Torres*, *supra*; *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015); *Kerry* v. *Din*, 135 S. Ct. 2128 (2015); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015). And in any event, the Ninth Circuit overlooked that Section 16(b) is the *federal criminal code's* definition of "crime of violence," and it applies to numerous federal criminal statutes. See p. 29, *infra*. If Section 16(b), when not applied under the INA through 8 U.S.C. 1101(a)(43)(F), had produced the same level of conflict and confusion as the ACCA's residual clause, this Court likely would have considered more than one case concerning that provision since its enactment in 1984, see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1001(a), 98 Stat. 2136, or at least since its incorporation into the INA in 1990, see Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 5048. Moreover, this Court has not had occasion to resolve a disputed question about the meaning of 18 U.S.C. 924(c)(3)(B), a definition of

"crime of violence" that is worded in a materially identical manner in an important criminal provision, even though this Court has on many occasions considered other questions arising under that provision. See, *e.g.*, *Rosemond* v. *United States*, 134 S. Ct. 1240 (2014); *Abbott* v. *United States*, 562 U.S. 8 (2010); *United States* v. *O'Brien*, 560 U.S. 218 (2010); *Watson* v. *United States*, 552 U.S. 74 (2007).

The far more likely explanation for the fact that this Court has granted review in only one Section 16(b) case in more than thirty years is that Section 16(b) is clearer than the ACCA's residual clause. To be sure, lower courts have disagreed about certain issues, such as whether Section 16(b) covers offenses with a mens rea of recklessness. Compare *Jimenez-Gonzalez* v. *Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008), with *Aguilar* v. *Attorney Gen.*, 663 F.3d 692, 696 (3d Cir. 2011). But similar questions have arisen in many statutory contexts. See, *e.g.*, *Voisine* v. *United States*, No. 14-10154 (argued Feb. 29, 2016) (whether offense with mens rea of recklessness can qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9)). Those narrow areas of disagreement have not approached the degree of conflict and confusion that the ACCA's residual clause generated. And such disagreements do not render a statute unconstitutionally vague, for "even clear laws produce close cases," *Johnson*, 135 S. Ct. at 2560.

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In short, the Ninth Circuit stretched this Court's decision in *Johnson* far beyond its scope to invalidate an important federal definitional provision that applies through numerous provisions of the INA, as well as in numerous criminal provisions. *Johnson* express-

ly relied on the confluence of multiple textual features of the ACCA's residual clause, as well as its checkered history in the courts, to hold that it was impermissibly vague. The most problematic of those features are not present in Section 16(b), and it is thus readily capable of judicial construction.

B. The Question Presented Warrants This Court's Review

The question whether Section 16(b), as applied to the INA's civil removal provisions through 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague warrants this Court's review. The divided Ninth Circuit panel declared a longstanding Act of Congress unconstitutional, which alone justifies review by this Court. That decision, moreover, also conflicts with a decision of the Sixth Circuit and will have profound practical implications for the administration of the INA and federal criminal law.

1. The question presented implicates a conflict of authority among the circuits that this Court should resolve. The Seventh Circuit has joined the Ninth Circuit in holding that Section 16(b), as incorporated into the INA's "aggravated felony" definition, is unconstitutionally vague under *Johnson*. See *United States* v. *Vivas-Ceja*, 808 F.3d 719 (2015).[4] Those

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[4] *Vivas-Ceja*, which involved a challenge to a sentence by an alien convicted of illegally reentering the United States, became moot shortly before en banc review was denied because the challenged term of imprisonment expired. A divided panel of the Fifth Circuit also held earlier this year that Section 16(b) is unconstitutionally vague, but the Fifth Circuit has granted rehearing en banc. *See United States* v. *Gonzalez-Longoria*, 813 F.3d 225 (2016), reh'g en banc granted, 815 F.3d 189 (argued May 24, 2016); cf. *In re Hubbard*, No. 15-276, 2016 WL 3181417, at *3-*6 (4th Cir. June 8, 2016) (holding that a federal prisoner had made out a

decisions conflict with the Sixth Circuit's decision in *Taylor*, *supra*, which upheld against a vagueness challenge the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which is worded in a materially identical manner. For many of the reasons discussed above (see pp. 17-26, *supra*), the Sixth Circuit determined that Section 924(c)(3)(B) "is considerably narrower" than the ACCA's residual clause and that therefore "much of *Johnson's* analysis does not apply" to the language of that provision. *Taylor*, 814 F.3d at 375-376. The court acknowledged that its decision conflicted with the decision below and *Vivas-Ceja* because "§ 16(b) appears identical to § 924(c)(3)(B) in all material respects," but it determined that "neither decision changes our conclusion." *Id.* at 379.[5]

2. Even apart from the holding of unconstitutionality and the need to resolve the circuit conflict, the question presented has exceptional importance for both immigration and criminal proceedings that calls for this Court's review.

a. The Ninth Circuit's invalidation of part of the INA's definition of "aggravated felony" will disrupt the enforcement of immigration laws against criminal aliens in the Nation's busiest judicial circuit for immigration enforcement. Under the INA's highly reticulated scheme, an alien's conviction for an "aggravated felony" triggers numerous legal consequences. Such a

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prima facie claim that Section 16(b) is unconstitutionally vague and granting motion to file a successive motion under 18 U.S.C. 2255).

[5] Section 924(c) contains a structural feature that distinguishes it from Section 16(b), as incorporated into 8 U.S.C. 1101(a)(43)(F): Section 924(c) requires that the defendant committed the offense with a specified nexus to a firearm. But the Sixth Circuit did not rely on that additional feature.

conviction renders an alien removable, 8 U.S.C. 1227(a)(2)(A)(iii); bars most forms of discretionary relief from removal, including cancellation of removal, asylum, and voluntary departure, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(C); subjects an alien to mandatory detention during the pendency of the removal proceeding, see 8 U.S.C. 1226(c); authorizes an abbreviated removal procedure for non-LPRs, 8 U.S.C. 1228(b); and precludes some aliens from becoming citizens, see 8 U.S.C. 1101(f)(8), 1427(a)(3). As a result of the decision below, however, criminal aliens who have committed Section 16(b) crimes of violence may evade these congressionally mandated restrictions, which are designed to ensure that dangerous aliens are removed from the United States. And of particular concern, many of the predicate offenses that have been held to fall under that provision are quite serious. For example, the Ninth Circuit has held the offenses of lewd and lascivious acts on a child, sexual penetration by a foreign object, sexual battery, kidnapping, and false imprisonment qualify as aggravated felonies by virtue of Section 16(b).[6]

In addition, the decision below may reduce the reach of an important tool for removing domestic abusers from the United States. Under 8 U.S.C. 1227(a)(2)(E)(i), an alien who has committed a Section

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[6] See *Rodriguez-Castellon* v. *Holder*, 733 F.3d 847, 856 (2013), cert. denied, 135 S. Ct. 355 (2014); *United States* v. *Sandoval-Orellana*, 714 F.3d 1174, 1177 (2013); *Lisbey* v. *Gonzales*, 420 F.3d 930, 931-934 (2005), cert. denied, 549 U.S. 868 (2006); *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125, 1126 (2012); *Barragan-Lopez* v. *Holder*, 705 F.3d 1112, 1114-1116 (2013).

16 "crime of violence" against a person who stands in a specified domestic relationship with the alien is removable, regardless of the length of the sentence for the offense. The Ninth Circuit's declaration that Section 16(b) is unconstitutionally vague as incorporated into the INA's definition of "aggravated felony" throws into serious question whether DHS may invoke that provision where the predicate crime falls within Section 16(b).

Finally, the Ninth Circuit's holding threatens the government's ability to prosecute criminal aliens convicted of crimes of violence who illegally reenter the United States. See 8 U.S.C. 1326. Under Ninth Circuit precedent, an alien may defeat a prosecution for illegal reentry by showing that the finding of removability was legally invalid. See, *e.g.*, *United States* v. *Aguilera-Rios*, 769 F.3d 626 (2014); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (2004). The Ninth Circuit's invalidation of Section 16(b), as incorporated into the aggravated-felony definition, will thus inevitably invite a host of new challenges to illegal-reentry prosecutions.

b. The holdings of the Seventh and Ninth Circuits also threaten to impede non-INA criminal prosecutions in those circuits. As discussed, Section 16 supplies a general definition of "crime of violence" for the United States Criminal Code. For that reason, the definition applies to numerous provisions of Title 18, including provisions covering such areas as money laundering, racketeering, domestic violence, and crimes against children.[7] In addition, the frequently

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[7] See 18 U.S.C. 25(a)(1), 119(b)(3), 931(a)(1), 1956(c)(7)(B)(ii), 3181(b)(1), 3663A(c)(1)(A)(i) (provisions expressly incorporating Section 16); see also 18 U.S.C. 842(p)(2), 929(a)(1), 1039(e)(1),

prosecuted offense set out in 18 U.S.C. 924(c)—using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or drug-trafficking offense—employs a definition of "crime of violence" that is materially identical in wording. 18 U.S.C. 924(c)(3)(B); see 18 U.S.C. 844(*o*), 1028(b)(3)(B), 4042(b)(3)(B) (provisions incorporating Section 924(c)(3)'s definition).

The decisions of the Seventh and Ninth Circuits have created a cloud of uncertainty over the lawfulness of criminal prosecutions and sentencing enhancements under those provisions. Although the Ninth Circuit majority stated that its decision did not reach any application of Section 16(b) other than its incorporation into the INA's definition of "aggravated felony," see App., *infra*, 20a n.17, the Ninth Circuit has already applied its decision to Sentencing Guidelines provisions that refer to the aggravated-felony definition. See *United States* v. *Hernandez-Lara*, 817 F.3d 651, 652-653 (Mar. 29, 2016) (per curiam). The decision has also engendered considerable uncertainty about the constitutionality of criminal provisions sharing Section 16(b)'s language. Indeed, the decision below prompted a district court in the Ninth Circuit to vacate five convictions under Section 924(c), including one for death caused by use of a firearm during a crime of violence. See *United States* v. *Lattanaphom*, CR No. 99-433, 2016 WL 393545, at *3-*6 (E.D. Cal. Feb. 2, 2016) (government's notice of appeal filed Feb. 22, 2016).[8]

1952(a), 1959(a)(4), 2250(d), 2261(a), 3142(f), 3559(f), 3561(b) (provisions using term "crime of violence").

[8] The question whether Section 924(c)(3)(B) is unconstitutionally vague is currently pending in the Ninth Circuit. See, *e.g.*, *United*

* * * * *

The Ninth Circuit's divided decision held unconstitutional on its face an important definitional provision in an Act of Congress that applies to many immigration and criminal provisions. It did so even though this Court has already authoritatively construed Section 16(b) and even though Section 16(b) shares few of the textual features and none of the tortured interpretive history that this Court found constitutionally fatal in *Johnson* with respect to the ACCA's residual clause. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2016

States v. *Gaytan*, No. 14-10167 (oral argument scheduled for June 15, 2016); *United States* v. *Andrade*, No. 14-10226 (same).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-71307

JAMES GARCIA DIMAYA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

Argued and Submitted: Sept. 1, 2015
Filed: Oct. 19, 2015

OPINION

Before: STEPHEN REINHARDT, KIM MCLANE WARDLAW, and CONSUELO M. CALLAHAN, Circuit Judges.

REINHARDT, Circuit Judge:

Petitioner James Garcia Dimaya seeks review of the Board of Immigration Appeals' (BIA) determination that a conviction for burglary under California Penal Code Section 459 is categorically a "crime of violence" as defined by 8 U.S.C. § 1101(a)(43)(F), a determination which rendered petitioner removable for having been convicted of an aggravated felony. During the pendency of petitioner's appeal, the United States Supreme Court decided *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which held that the Armed Career

Criminal Act's ("ACCA") so-called "residual clause" definition of a "violent felony" is unconstitutionally vague. In this case, we consider whether language similar to ACCA's residual clause that is incorporated into § 1101(a)(43)(F)'s definition of a crime of violence is also void for vagueness. We hold that it suffers from the same indeterminacy as ACCA's residual clause and, accordingly, grant the petition for review.

I

Petitioner, a native and citizen of the Philippines, was admitted to the United States in 1992 as a lawful permanent resident. In both 2007 and 2009, petitioner was convicted of first-degree residential burglary under California Penal Code section 459 and sentenced each time to two years in prison. If a non-citizen is convicted of an aggravated felony, he is subject to removal. 8 U.S.C. § 1227(a)(2)(A)(iii). Citing petitioner's two first-degree burglary convictions, the Department of Homeland Security ("DHS") charged that petitioner was removable because he had been convicted of a "crime of violence . . . for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).[1] That statute defines a "crime of vio-

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[1] DHS also charged that petitioner was removable for having committed two crimes of moral turpitude, *see* 8 U.S.C. § 1227(a)(2)(A)(ii), and for having committed a "theft offense . . . or burglary offense for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Although the Immigration Judge (IJ) agreed with DHS that petitioner was removable on either of these two grounds, the Board of Immigration Appeals (BIA) dismissed petitioner's appeal on the sole ground that he was removable for having committed a crime of violence under 8 U.S.C. § 1101(a)(43)(F).

lence" by reference to 18 U.S.C. § 16, which provides the following definition:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Immigration Judge (IJ) agreed with DHS that first-degree burglary in California is a crime of violence. Citing § 16(b) and *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990), the IJ explained that "unlawful entry into a residence is by its very nature an offense where is apt to be violence [sic], whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon." Because the charging documents for each conviction alleged an unlawful entry, and because the term of imprisonment for each conviction was greater than one year, the IJ determined that these convictions were crimes of violence. On the basis of this conclusion, the IJ held that petitioner was removable and ineligible for any relief. The BIA dismissed petitioner's appeal on the same ground. Citing § 16(b) and *Becker*, the BIA concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force," and therefore affirmed the IJ's

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Therefore, whether the relevant definition of a "crime of violence" is constitutional is the only issue we reach.

holding that petitioner was convicted of a crime of violence.[2]

Petitioner filed a timely petition with this Court for review of the BIA's decision. After the parties argued this case, the United States Supreme Court decided *Johnson* and, because the definition of a crime of violence that the BIA relied on in this case is similar to the unconstitutional language in ACCA's residual clause,[3] we ordered supplemental briefing and held a supplemental oral argument regarding whether § 16(b), as incorporated into the INA, is also unconstitutionally vague. We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review questions of law, including whether language in the immigration statutes is void for vagueness. *See Alphonsus v. Holder*, 705 F.3d 1031, 1036-37 (9th Cir. 2013). That question, as a pure question of law, receives *de novo* review from this Court. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 (9th Cir. 2010).

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[2] Notwithstanding the fact that the BIA appeared to consider only the petitioner's 2007 conviction, the government argues in this case that both of petitioner's first-degree burglary convictions are crimes of violence under 18 U.S.C. § 16(b). This discrepancy is immaterial, as the same analysis applies to both convictions.

[3] The subsection of ACCA that includes the residual clause defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year ... that ... is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). As the Court noted in *Johnson*, the italicized words of this definition are known as the residual clause. 135 S. Ct. at 2555-56.

II

The Fifth Amendment's Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Alphonsus*, 705 F.3d at 1042 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation. *Jordan v. De George*, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation."); *see also A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239, 45 S. Ct. 295, 69 L. Ed. 589 (1925) ("The defendant attempts to distinguish [prior vagueness] cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.").

Previously, we have recognized the vagueness doctrine's applicability in the context of withholding of removal "because of the harsh consequences attached to . . . denial of withholding of removal." *Alphonsus*, 705 F.3d at 1042 (citing *Jordan*, 341 U.S. at 230-31, 71 S. Ct. 703). In this case, Petitioner challenges a statute as unconstitutionally vague in the context of denial of cancellation of removal.

For due process purposes, this context is highly analogous to denial of withholding of removal because both

pose the harsh consequence of almost certain deportation. Under withholding of removal, a non-citizen who is otherwise removable cannot be deported to his home country if he establishes that his "life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Under cancellation of removal, immigration authorities may cancel the removal of a lawful permanent resident who satisfies certain criteria based on length of residency, good behavior, and exceptional hardship. *Id.* § 1229b(b)(1). Non-citizens who commit certain criminal offenses are ineligible for these forms of relief. *See id.* §§ 1231(b)(3)(B)(ii), 1229b(b)(1)(C). As with denial of withholding of removal, then, denial of cancellation of removal renders an alien ineligible for relief, making deportation "a virtual certainty." *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011).

The government argues that our circuit's reliance on *Jordan* "is misguided as *Jordan* did not authorize vagueness challenges to deportation statutes." We find this suggestion baffling. *Jordan* considered whether the term "crime involving moral turpitude" in section 19(a) of the Immigration Act of 1917, a type of offense that allowed for a non-citizen to "be taken into custody and *deported*," was void for vagueness. 341 U.S. at 225-31, 71 S. Ct. 703 (emphasis added). In considering this challenge, the Court explicitly rejected the argument that the vagueness doctrine did not apply. *Id.* at 231, 71 S. Ct. 703. The government also argues that subsequent Supreme Court decisions rejected due process challenges to various immigration statutes. *See Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 99 L. Ed. 1107 (1955); *Galvan v. Press*, 347 U.S. 522, 530-31, 74 S. Ct. 737, 98

L. Ed. 911 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-91, 72 S. Ct. 512, 96 L. Ed. 586 (1952). None of these cases, however, suggests that the Due Process Clause does not apply to deportation proceedings. Nor could they, for it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003) (internal quotation marks omitted).

As the Supreme Court recognized in *Jordan*, a necessary component of a non-citizen's right to due process of law is the prohibition on vague deportation statutes. Recently, the Supreme Court noted the need for "efficiency, fairness, and predictability in the administration of immigration law." *Mellouli v. Lynch*, — U.S. —, 135 S. Ct. 1980, 1987, 192 L. Ed. 2d 60 (2015). Vague immigration statutes significantly undermine these interests by impairing non-citizens' ability to "anticipate the immigration consequences of guilty pleas in criminal court." *Id.* (internal quotation marks omitted); *see also Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) ("[A]ccurate legal advice for noncitizens accused of crimes has never been more important" because "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)). For these reasons, we reaffirm that petitioner may bring a void for vagueness challenge to the definition of a "crime of violence" in the INA.[4]

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[4] Several other Circuit Courts of Appeals have also entertained void for vagueness challenges to immigration statutes. *See*

III

To understand *Johnson*'s effect on this case, it is helpful to view § 16(b), as incorporated into the INA, alongside the residual clause at issue in *Johnson*. The INA provides for the removal of non-citizens who have been "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Its definition of an aggravated felony includes numerous offenses, including "a crime of violence (as defined in section 16 of Title 18 . . .)." 8 U.S.C. § 1101(a)(43)(F). The subsection of 18 U.S.C. § 16 that the BIA relied on in this case defines a crime of violence as an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). Had Congress written out the relevant definition in full instead of relying on cross-referencing, a lawful permanent resident would be removable if "convicted of an offense that is a felony and that, by its nature, *involves a substantial risk that physical force against the person or property of another may be used* in the course of committing the offense" (emphasis added). The language in ACCA that *Johnson* held unconstitutional is similar. The ACCA provision defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year [i.e., a felony] . . . that . . . *involves conduct that presents a serious potential risk of physical injury to another.*" 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Importantly, both the provision at issue here and ACCA's residual clause are subject to the same mode of analysis.

Mhaidli v. Holder, 381 Fed. Appx. 521, 525-26 (6th Cir. 2010) (unpublished); *Arriaga v. Mukasey*, 521 F.3d 219, 222 (2d Cir. 2008); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008).

Both are subject to the categorical approach, which demands that courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime."[5] *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). Specifically, courts considering both § 16(b) and the residual clause must decide what a "'usual or ordinary' violation" of the statute entails and then determine how great a risk of injury that "ordinary case" presents. *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013) (quoting *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2013)).

In *Johnson*, the Supreme Court recognized two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S. Ct. at 2557. First,

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[5] Although it is largely irrelevant for the purposes of this case, the dissent's characterization of the categorical approach is incorrect. The dissent correctly explains that categorical approach cases such as *Descamps v. United States*, — U.S. —, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), and *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990) hold that a state conviction must include all elements of the equivalent federal generic offense to qualify as a violent felony. The dissent then goes on to assert, incorrectly, that those cases, which deal with ACCA, shed light on how to interpret § 16(a). *Taylor*, *Shepard*, and *Descamps* tell us nothing about § 16(a), however, because they do not interpret § 924(e)(2)(B)(i)—the subsection of ACCA with language identical to § 16(a). Instead, those cases consider a different subsection—the list of *enumerated felonies* that appears in § 924(e)(2)(B)(ii), of which burglary is one. *See Descamps*, 133 S. Ct. at 2281; *Shepard*, 544 U.S. at 16-17, 125 S. Ct. 1254; *Taylor*, 495 U.S. at 581-82, 110 S. Ct. 2143. Because § 16 does not include any enumerated felonies in either subsection (a) or (b), those cases are inapplicable.

the Court explained, the clause left "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involves." *Id.* That is, the provision "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges" because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, the Court stated, ACCA's residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. By combining these two indeterminate inquiries, the Court held, "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[6] *Id.* On that ground it held the residual clause void for vagueness. The Court's reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA. The result is that because of the same combination of indeterminate inquiries, § 16(b) is subject to identical unpredictability and arbitrariness as ACCA's residual clause. In sum, a careful analysis of the two

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[6] The dissent essentially agrees with this reading except that it argues that *Johnson* "only prohibits uses [of § 16(b)] that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime." Nothing in *Johnson*, however, suggests that the Court considered the constitutionality of ACCA's residual clause in reference to the crime Johnson actually committed. To the contrary, the Court never discussed Johnson's predicate offense—unlawful possession of a short-barreled shotgun—but instead held in absolute terms that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2563. *Johnson* therefore clearly holds that the residual clause is unconstitutionally vague in all instances, not just for some subset of crimes.

sections, the one at issue here and the one at issue in *Johnson*, shows that they are subject to the same constitutional defects and that *Johnson* dictates that § 16(b) be held void for vagueness.

A

In *Johnson*, the Supreme Court condemned ACCA's residual clause for asking judges "to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-58. To illustrate its point, the Court asked rhetorically whether the "ordinary instance" of witness tampering involved "offering a witness a bribe" or instead "threatening a witness with violence." *Id.* at 2557; *see also id.* at 2558 (It is just as likely that "a violent encounter may ensue" during an attempted burglary as it is that "any confrontation that occurs . . . 'consist[s] of nothing more than the occupant's yelling "Who's there?" from his window, and the burglar's running away.'" (quoting *James v. United States*, 550 U.S. 192, 211, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007), and *id.* at 226, 127 S. Ct. 1586 (Scalia, J., dissenting))).[7]

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[7] "Does the ordinary burglar invade an occupied home by night or an unoccupied home by day?" *Johnson*, 135 S. Ct. at 2558. It seems that one arrives at a different answer about what the "ordinary case" of burglary involves whether one uses "[g]ut instinct" or "statistical analysis." *Id.* at 2557 (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). Although many people surely imagine the possibility of a violent encounter when they picture burglary, recent government statistics show that only about seven percent of burglaries nationwide involved incidents of violence. Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglaries* 1 (Sept. 2010), http://www.bjs.gov/content/pub/pdf/vdhb.pdf. Such statistics only high-

As with ACCA's residual clause, the INA's crime of violence provision requires courts to "inquire whether 'the conduct encompassed by the elements of the offense, in the ordinary case, presents'" a substantial risk of force. *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1128 (9th Cir. 2012) (quoting *James*, 550 U.S. at 208, 127 S. Ct. 1586); *see also Rodriguez-Castellon*, 733 F.3d at 854. We see no reason why this aspect of *Johnson* would not apply here, and indeed the government concedes that it does. As with the residual clause, the INA's definition of a crime of violence at issue in this case offers "no reliable way to choose between these competing accounts" of what a crime looks like in the ordinary case. *Johnson*, 135 S. Ct. at 2558.

B

In many circumstances, of course, statutes require judges to apply standards that measure various degrees of risk. *See* Supplemental Brief for Respondent at 1a, *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (No. 13-7120) (cataloguing federal statutes). The vast majority of those statutes pose no vagueness problems because they "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."[8] *Johnson*, 135 S. Ct. at 2561. The sta-

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light the arbitrary nature of this inquiry, even in the seemingly easy case of burglary.

[8] The dissent argues that any "person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected" and then asks "Is this not what the Supreme Court was referring to when it noted 'we do not doubt the constitutionality of laws that call for application of a qualitative standard such as "substantial risk" to real-world conduct?'" Dissent at 1126 (quoting *Johnson*, 135 S. Ct. at 2561). Plainly not. As the dissent's use of the word "inherently" proves, the dissent's

tute at issue in *Johnson* was not one of those statutes, however. Nor is the provision at issue here. If the uncertainty involved in describing the "ordinary case" of a crime was not enough, its combination with the uncertainty in determining the degree of risk was. ACCA's violent felony definition requires judges to apply "an imprecise 'serious potential risk'[9] standard . . . to [the] judge-imagined abstraction" of a crime in the ordinary case. *Id.* at 2558. The same is equally true of the INA's definition of a crime of violence at issue here. Section 16(b) gives judges no more guidance than does the ACCA provision as to what constitutes a substantial enough risk of force to satisfy the statute. Accordingly, *Johnson*'s holding with respect to the imprecision of the serious potential risk standard is also clearly applicable to § 16(b). As with ACCA's residual clause, § 16(b)'s definition of a crime of violence, combines "indeterminacy about how to measure the risk posed by a crime with indeterminacy

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argument does not rest on the facts of an actual burglary but instead on the dissent's conception of burglary in the ordinary case. A statute that allowed courts to evaluate the record to determine whether a defendant actually engaged in violence would fall within the language the dissent cites. However, as the Supreme Court has repeatedly made clear, when applying the categorical approach that ACCA and § 16(b) demand, courts must consider "what offense the noncitizen was 'convicted of' . . . not what acts he committed." *Moncrieffe*, 133 S. Ct. at 1678.

[9] ACCA's residual clause required courts to evaluate whether an offense posed "a serious potential risk" while the relevant INA definition asks whether an offense poses "a substantial risk." *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with id.* § 16(b). Measuring whether an offense poses a "substantial" risk, however, is no less arbitrary than measuring whether it poses a "serious potential" one, and the government offers no suggestion to the contrary.

about how much risk it takes for the crime to qualify as" a crime of violence.[10] 135 S. Ct. at 2558.

C

Notwithstanding the undeniable identity of the constitutional defects in the two statutory provisions, the government and dissent offer several unpersuasive ar-

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[10] At the supplemental oral argument, the government argued that two recent decisions from other circuit courts of appeals conflict with our holding in this case. *See Ortiz v. Lynch*, 796 F.3d 932 (8th Cir. 2015); *United States v. Fuertes*, No. 13-4755, 805 F.3d 485, 2015 WL 4910113 (4th Cir. Aug. 18, 2015). Neither case, however, is of any help to the government. The Eighth Circuit noted that *Ortiz* "does not implicate the analysis in" *Johnson* because, in *Ortiz*, the government argued that the petitioner's conviction qualified as a crime of violence under § 16(a), a completely different statutory definition. *Ortiz*, 796 F.3d at 935-36 & n.2. Indeed § 16(a) is highly similar to analogous language in ACCA, 18 U.S.C. § 924(e)(2)(B)(i), that *Johnson* left untouched. 135 S. Ct. at 2563 ("Today's decision does not call into question . . . the remainder of the Act's definition of a violent felony."). *Fuertes* is of even less help, if possible. There, the Fourth Circuit held that it did not need to reach the question whether *Johnson* applied to language similar to § 16(b) that appears in 18 U.S.C. § 924(c)(3)(B) because, in any case, the defendant's offense did not satisfy the statutory language in question. *See Fuertes*, 805 F.3d at 499-501 & 499 n.5, 2015 WL 4910113 at *9-10 & 9 n.5. Finally, the dissent cites *In re Gieswein*, No. 15-6138, 802 F.3d 1143, 2015 WL 5534388 (10th Cir. Sept. 21, 2015), in which the Tenth Circuit noted that the "definition [that survived *Johnson*] of 'violent felony' under the ACCA includes a felony conviction for 'burglary.'" *Id.* at 491 n.2, 2015 WL 4910113 at *2 n.2. Yes, but only because the portion of ACCA that survived includes a list of four enumerated felonies, of which burglary is one. That, after *Johnson*, ACCA continues to cover burglary through one of its enumerated offenses says nothing about whether § 16(b) can be constitutionally applied to burglary or any other offense.

guments in an attempt to save the INA provision at issue in this case. First, the government and dissent argue that the Supreme Court found ACCA's standard to be arbitrary in part because the residual clause "force[d] courts to interpret 'serious potential risk' in light of the four enumerated crimes" in the provision,[11] crimes which are "far from clear in respect to the degree of risk each poses." *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 143, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008) (internal quotation marks omitted)). It is true that, after the Court set forth its holding in *Johnson*, it cited the provision's four enumerated offenses in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term "serious potential risk." *Id.* at 2561. In doing so, however, it stated that while the listed offenses added to the uncertainty, the fundamental reason for the Court's holding was the residual clause's "application of the 'serious potential risk' standard to an idealized ordinary case of the crime."[12] *Id.* In short, this response clearly reiterated that what distinguishes

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[11] The relevant provision of ACCA defined a "violent felony" as any felony that is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). As noted above in footnote 3, the "residual clause" is defined as the portion of provision that follows "explosives."

[12] The Solicitor General's brief in *Johnson* also recognized that because section 16(b), as applied in the INA, "requires a court to identify the ordinary case of the commission of the offense," it is "equally susceptible to [Johnson's] central objection to the residual clause." Supplemental Brief for Respondent at 22-23, *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (No. 13-7120).

ACCA's residual clause from many other provisions in criminal statutes was, consistent with its fundamental holding, the use of the "ordinary case" analysis. *Johnson* therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses.[13]

Next, the government argues that ACCA's residual clause requires courts to consider the risk that would arise after completion of the offense, *see Johnson*, 135 S. Ct. at 2557, and that § 16(b) applies only to violence occurring "in the course of committing the offense," 18 U.S.C. § 16(b). First, we doubt that this phrase actually creates a distinction between the two clauses. For example, we have consistently held that California's burglary statute (the very statute at issue in this case) is a crime of violence for the purposes of the INA precisely because of the risk that violence will ensue after the defendant has committed the acts necessary to constitute the offense. *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (describing the risk that a burglar "will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension" (quoting

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[13] Although *Johnson* concluded that the enumerated offenses added to the residual clause's indeterminacy, it could well be argued that, if anything, § 16(b) is more vague than the residual clause because of its lack of enumerated examples. To be sure, ACCA's enumerated examples are "far from clear in respect to the degree of risk each poses." *Johnson*, 135 S. Ct. at 2558. However, they provide at least *some* guidance as to the sort of offenses Congress intended for the provision to cover. Section 16(b), by contrast, provide no such guidance at all.

Becker, 919 F.2d at 571)).[14] By the time the risk of physical force against an occupant arises, however, the defendant has frequently already satisfied the elements of the offense of burglary under California law. *See* Cal. Penal Code § 459 (defining burglary as "enter[ing] any house, room, apartment, [etc.] . . . with intent to commit grand or petit larceny or any felony"). More important, even if such a distinction did exist, it would not save the INA's definition of a crime of violence from unconstitutionality. The Court, in *Johnson*, held ACCA's residual clause to be unconstitutionally vague because it combined the indeterminate inquiry of "how to measure the risk posed by a crime" in the ordinary case with "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S. Ct. at 2558. This reasoning applies equally whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense.[15]

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[14] In holding that burglary under California law constituted a crime of violence in *Lopez-Cardona*, we were not asked to consider the question of § 16(b)'s constitutionality; nor did we do so. For the same reason, the dissent's lengthy discussion of this court's prior holdings regarding burglary and § 16(b) is irrelevant. Here, we do not consider what offenses fall within § 16(b) but instead whether the provision may be constitutionally applied. That latter question is answered here and, as a result, all of our prior cases relating to which offenses fall within the scope of that provision are to that extent of no further force or effect.

[15] The government also suggested at the supplemental oral argument that our decision in this case would require holding that *Johnson* overruled *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004), which stated in dicta that burglary is the

The government also argues that § 16(b) has not generated the same degree of confusion among courts that ACCA's residual clause generated. It notes that, in contrast to the five residual clause cases that the Supreme Court has decided in addition to *Johnson*, the Court has decided only a single case interpreting section 16(b). *See Leocal*, 543 U.S. at 10-11, 125 S. Ct. 377. That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application. We can discern very little regarding the merits of an issue from the composition of the Supreme Court's docket. The Court has

> repeatedly indicated that a denial of certiorari means only that, for one reason or another which is

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"classic example" of an offense that would satisfy § 16(b). *Id.* at 10, 125 S. Ct. 377. The dissent now adopts a related argument: that this statement from *Leocal* proves that "there is no unconstitutional vagueness in this case." Dissent at 1129. In deciding whether the offense of "driving under the influence of alcohol . . . and causing serious bodily injury" qualified as a crime of violence, however, *Leocal* said nothing about whether the statutory language in § 16(b) is void for vagueness. Moreover, *Johnson* casts doubt on the notion that burglary could easily be characterized as a crime that involves a substantial risk of violence under § 16(b). *See* 135 S. Ct. at 2557 ("The act of . . . breaking and entering into someone's home does not, in and of itself, normally cause physical injury."). Finally, even if there were some "straightforward cases" or categories of cases under § 16(b), *Johnson* squarely rejected the argument that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp," *id.* at 2561-62, and clearly stated that the residual clause was void for vagueness in all applications, *id.* at 2563. There is therefore no need in this opinion to consider the continued validity of the statement in *Leocal* cited by the government and dissent.

> seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

Daniels v. Allen, 344 U.S. 443, 492, 73 S. Ct. 437, 97 L. Ed. 469 (1953); *see also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973) (describing the "well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits"). Moreover, the Supreme Court in recent years has decided substantially more federal criminal appeals than immigration appeals. The Court's history of deciding ACCA residual clause cases in greater numbers than INA crime of violence cases is thus consistent with its greater interest in federal criminal cases than in immigration cases. In fact, over this period the ratio of federal criminal cases to immigration cases significantly exceeds the ratio of ACCA residual clause cases to INA crime of violence cases on which the government relies.[16]

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[16] During the nine terms preceding the 2015 term, the Supreme Court decided a total of 85 federal criminal appeals versus only 12 immigration appeals. These statistics come from the Harvard Law Review, which compiles statistics each year after the completion of the Supreme Court term. Every version of "The Statistics" includes a table that records the number of cases decided each year by "subject matter." They are available at http://harvardlawreview.org/category/statistics/.

IV

In *Johnson*, the Supreme Court held that ACCA's residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" by "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S. Ct. at 2558. Although the government can point to a couple of minor distinctions between the text of the residual clause and that of the INA's definition of a crime of violence, none undermines the applicability of *Johnson*'s fundamental holding to this case. As with ACCA, section 16(b) (as incorporated in 8 U.S.C. § 1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,'" not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson*, these uncertainties render the INA provision unconstitutionally vague.[17]

We GRANT the petition for review and REMAND to the BIA for further proceedings consistent with this opinion.

CALLAHAN, Circuit Judge, dissenting:

Contrary to the majority's perspective, the Supreme Court's opinion in *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), does not infect 18 U.S.C. § 16(b)—or other statutes—with unconstitutional

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[17] Our decision does not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence.

vagueness. Rather, the Supreme Court carefully explained that the statute there in issue, a provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague for two specific reasons: the clause (1) "leaves grave uncertainty about how to estimate the risk posed by a crime"; and (2) "leaves uncertainty about how much risk it takes for a crime to qualify as a violent crime." *Id.* at 2557-58. In contrast, § 16(b), as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of these shortcomings. The majority's contrary conclusion fails to appreciate the purpose of § 16(b), elevates the Supreme Court's reference to "ordinary cases" from an example to a rule, and ignores the Court's statement that it was not calling other statutes into question (which explains why the Court did not even mention *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)). Accordingly, I dissent.

Our criminal and immigration laws are not as simple as the majority opinion implies. Accordingly, I first describe the purpose of § 16 and how courts have interpreted the statute, before reviewing the Supreme Court's decision in *Johnson*, and concluding that the twin concerns expressed by the Supreme Court in *Johnson* do not infect § 16(b).

I.

Title 18 U.S.C. § 16 contains two distinct definitions of "crime of violence," with distinct purposes, effects, and judicial pedigrees. Subsection (a) defines "crime of violence" as "an offense that has as an *element* the use, attempted use, or threatened use of physical force against the person or property of another." (emphasis added). Subsection (b) sets forth a distinct definition that covers offenses that are not within subsection (a)'s definition. It

states that "crime of violence" means "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." It follows that an offense that is a "crime of violence" under subsection (a) also meets the criteria in subsection (b), but that subsection (b) covers offenses that do not meet the criteria in subsection (a). These subsections serve different functions with different consequences.

An appreciation of the differences between the subsections and their roles informs my understanding of the Supreme Court's opinions in *Descamps v. United States*, — U.S. —, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), and *Moncrieffe v. Holder*, — U.S. —, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013). Although the terms "crime of violence," "violent felony," and "aggravated felonies" may appear to be synonymous to a lay person, courts have recognized that, as used in their statutory contexts, they are distinct terms of art covering distinct acts with different legal consequences.

A.

In *Descamps*, the Government sought an enhancement of Descamps' sentence under the ACCA, 18 U.S.C. § 924(e), on the basis that his California conviction for burglary was a "violent felony."[1] *Descamps*, 133 S. Ct. at

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[1] The statute, 18 U.S.C. § 924(e)(2)(B), reads, in relevant part:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that– (i)

2281-82. In *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the Supreme Court had established a "rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses." *Descamps*, 133 S. Ct. at 2283. In other words, *Taylor* focused on whether the state crime and the enumerated federal predicate offense had the same elements. In *Taylor*, the Court first determined the federal definition of burglary, and then considered how courts were to determine whether a state conviction met that definition.[2] The Court, concerned with the substantive and practical problems of determining that the state conviction met the criteria for a federal offense, set forth a "categorical approach" instructing sentencing courts to look at the statutory definitions and not to the particular facts underlying a conviction.[3] *Des-*

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has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

[2] In *Taylor*, the Court stated: "[w]e conclude that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 599, 110 S. Ct. 2143.

[3] In *Taylor*, the Supreme Court noted:

> Our present concern is only to determine what offenses should count as "burglaries" for enhancement purposes. The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B)(ii).

camps, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 600, 110 S. Ct. 2143).

In *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), the Court had established the "modified categorical approach," which allows a sentencing court to scrutinize a restricted set of materials to determine whether a state conviction matches the generic federal offense. The Supreme Court later explained in *Descamps* that the modified categorical approach was a tool "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."[4] 133 S. Ct. at 2285. The Court reiterated that its "elements-centric" approach was based on three grounds: (1) "it comports with ACCA's test and history"; (2) "it avoids the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries"; and (3) "it averts

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495 U.S. at 600 n.9, 110 S. Ct. 2143.

[4] The Supreme Court explained:

> The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." *Nijhawan* [*v. Holder*], 557 U.S. [29] 41 [129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009)]. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of.

Descamps, 133 S. Ct. at 2285.

the practical difficulties and potential unfairness of a factual approach." *Id.* at 2287 (internal citation omitted).

Similar concerns with fairness underlie the Supreme Court's opinion in *Moncrieffe*, 133 S. Ct. 1678. The Court stated that it granted certiorari "to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both [21 U.S.C.] § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that 'proscribes conduct punishable as a felony under' the CSA [Controlled Substance Act]." *Id.* at 1684. This, in turn, required a determination of whether the state conviction qualified as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*[5] *Id.* The Court, accordingly, applied the categorical approach "to determine whether the state offense is comparable to an offense listed in the INA." *Id.* It explained that in order to satisfy the categorical approach, the state drug offense "must 'necessarily' proscribe conduct that is an offense under the CSA, and the CSA must 'necessarily' prescribe felony punishment for that offense." *Id.* at 1685. The Court concluded that Moncrieffe's state conviction failed to meet this standard, and accordingly, he was not convicted of an aggravated felony. *Id.* at 1687.

In both *Descamps* and *Moncrieffe*, the critical inquiry was whether the underlying state criminal conviction fit

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[5] The INA provides that an alien "convicted of an aggravated felony" is removable, § 1227; is not eligible for asylum, § 1158(b)(2)(a)(ii); and is not eligible for cancellation of removal or adjustment of status, § 1229b(a)(3).

within a generic federal definition of a crime so that a defendant could be expected to have asserted all relevant defenses in his state trial. The underlying concerns had been set forth by the Supreme Court in *Shepard*:

> Developments in the law since *Taylor*, and since the First Circuit's decision in [*United States v.*] *Harris* [964 F.2d 1234 (1st Cir. 1992)], provide a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction "necessarily" involved (and a prior plea necessarily admitted) facts equating to generic burglary. The *Taylor* Court, indeed, was prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry. "If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a nongeneric burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" 495 U.S. at 601, 110 S. Ct. 2143. The Court thus anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant. *Jones v. United States*, 526 U.S. 227, 243, n.6 [119 S. Ct. 1215, 143 L. Ed. 2d 311] (1999); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 [120 S. Ct. 2348, 147 L. Ed. 2d 435] (2000).

544 U.S. at 24, 125 S. Ct. 1254 (alteration in original). Thus, for purposes such as sentencing under the ACCA, a state conviction is only an aggravated felony under § 16(a)

if the court can fairly conclude that the conviction included all the elements of a federal offense.

B.

While 18 U.S.C. § 16(a) looks to whether the state conviction contained the elements of a federal offense, the Supreme Court and the circuit courts have recognized that § 16(b) asks a different question with different parameters and consequences. In *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, a unanimous Court held that a Florida conviction for driving under the influence of alcohol was not a crime of violence under § 16(a) or § 16(b). *Id.* at 4, 125 S. Ct. 377. The opinion describes § 16(b) as follows:

> Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. . . . The classic example is burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

543 U.S. at 10, 125 S. Ct. 377 (footnote omitted). Thus, when applying § 16(b), courts do not ask whether the state

conviction contained the elements of a federal offense, but whether there was a "risk that the use of physical force against another might be required in committing" the state crime. 18 U.S.C. § 16(b).

We most recently recognized this distinct treatment of § 16(b) in *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). In this opinion, rendered after the Supreme Court issued its decision in *Descamps*, we explained:

> Under 18 U.S.C. § 16, the phrase "crime of violence" has two meanings. First, under § 16(a), a state crime of conviction is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." . . . Second, even if the state crime does not include one of the elements listed in § 16(a), it is a "crime of violence" under § 16(b) if it is: (i) a felony; and (ii) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). The Supreme Court has explained that § 16(b) criminalizes conduct that "naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004).

733 F.3d at 853-54.

Our holding in *Rodriguez-Castellon* is consistent with our prior opinions recognizing that first-degree burglary under California Penal Code § 459 remains an "aggravated felony" under § 16(b) even if the state crime did not include an element of the federal crime and thus

was not an "aggravated felony" under § 16(a). *See United States v. Ramos-Medina*, 706 F.3d 932, 937-38 (9th Cir. 2013).

In *Chuen Piu Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011), we explained:

> The question for decision, then, is whether Kwong's [burglary] offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of [its commission]." 18 U.S.C. § 16(b).
>
> We answered that question in the affirmative some time ago in *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990), where we held that "first-degree burglary under California law is a 'crime of violence'" as defined by 18 U.S.C. § 16(b). *See also United States v. Park*, 649 F.3d 1175, 1178-79 (9th Cir. 2011). We pointed out in *Becker* that "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." 919 F.2d at 571 (footnote omitted).[6]

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[6] In response to Kwong's argument that California's definition of first-degree burglary is broader than the generic federal definition, the Ninth Circuit held:

> These arguments are foreclosed, however, by our recent decision in *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011). *Lopez-Cardona* flatly held that, under *Becker*, first-degree burglary in violation of California Penal Code § 459 was a crime of violence within the meaning of 18 U.S.C. § 16(b). *Id.* at 1113. It also held that *Aguila-Montes* had

Id. at 878.

Similarly, in *United States v. Avila*, 770 F.3d 1100, 1105 (4th Cir. 2014), the Fourth Circuit concluded that "California first-degree burglary qualifies as a crime of violence under the residual clause of 18 U.S.C. § 16(b)." It held that it need look no further than the Supreme Court's opinion in *Leocal*, 543 U.S. at 10, 125 S. Ct. 377, in concluding that burglary was the classic example of an offense covered by § 16(b).

Thus, the Supreme Court, our prior decisions, and the Fourth Circuit, all recognize that the inquiries under § 16(a) and § 16(b) are distinct, and that even though a state conviction for burglary may not include an element of a generic federal offense, as required to come within § 16(a), a burglary conviction nonetheless involves a substantial risk of physical force, and thus is covered by § 16(b).

II.

Having set forth the scope of § 16(b) and the courts' treatment of the section, I turn to the Supreme Court's opinion in *Johnson*.

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no effect on that conclusion because *Aguila-Montes* was based on a different definition of "crime of violence"; *Aguila-Montes* held only that a conviction under California Penal Code § 459 did not constitute a conviction for generic burglary. *Lopez-Cardona*, 662 F.3d at 1113. *Aguila-Montes* accordingly did not contradict or affect Becker's holding that first-degree burglary under § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense. *Id.* at 1111-12.

671 F.3d at 877-78.

A.

The Supreme Court held that the residual clause of the Armed Career Criminal Act of 1984 violates the Constitution's guarantee of due process.[7] The Court concluded "that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557. The Court concluded that two features of the residual clause "conspire to make it unconstitutional." *Id.* at 2557. "In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

> By asking whether the crime "otherwise involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay* [*v. United States*], 553 U.S. [137] 143 [128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008)]. . . . By combining indeterminacy about how to measure the risk posed by

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[7] The residual clause of the ACCA increased the prison term of a defendant who had been convicted of "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

> a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Id. at 2558.

The Court then reviewed its prior efforts to establish a standard and concluded that "*James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition."[8] *Id.* at 2559. The Court further noted that in the lower courts, the residual clause has created numerous splits and the clause has proved nearly impossible to apply consistently.[9] *Id.* at 2560. The Court concluded that "[n]ine years' experience trying to derive meaning from the residual clause convinces us that we have embarked on a failed enterprise." *Id.*

The Court stated, in rejecting the argument that because there may be straightforward cases under the residual clause, the clause is not constitutionally vague:

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[8] *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007); *Chambers v. United States*, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009); and *Sykes v. United States*, 564 U.S. 1, 131 S. Ct. 2267, 180 L. Ed. 2d 60 (2011).

[9] The Court commented:

> The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.

Id. at 2560.

The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. *See post*, at 2558-2559. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so." *James*, 550 U.S., at 230, n.7, 127 S. Ct. 1586, (Scalia, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," *Nash v. United States*, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *Int. Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223, 34 S. Ct. 853, 58 L. Ed. 1284 (1914).

Id. at 2561.

The Court also declined the dissent's invitation "to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime." *Id.* at 2562. It explained:

> In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S. at 600, 110 S. Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

Id. at 2562.

Finally, the opinion's penultimate paragraph reads:

> We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question ap-

plication of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

Id. at 2563.

B.

I read *Johnson* as setting forth a two-part test: whether the statute in issue (1) "leaves grave uncertainty about how to estimate the risk posed by the crime"; and (2) "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. Applying this test, the Court faulted the residual clause for requiring potential risk to be determined in light of "four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives . . . [which] are far from clear in respect to the degree of risk each poses." *Id.* at 2558 (internal citation omitted). The Court's concern was clarified by its reference to a prior dissent by Justice Scalia: "The phrase 'shades of red,' standing alone does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue or colors that otherwise involve shades of red' assuredly does so." *Id.* at 2561.

The Court also faulted the residual clause for tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 2557. However, the Court specifically stated that it was not abandoning the categorical approach, which, as noted, looks to the "ordinary case." *See Descamps*, 133 S. Ct. at 2285 (holding the categorical approach's central feature is "a focus on the elements, rather than the facts, of a crime"). It is true that *Descamps*, like § 16(a), looks to the elements of a crime, not to the potential risk from the crime. None-

theless, in declining the dissent's suggestion that it "jettison for the residual clause . . . the categorical approach," the Court recognized that there were "good reasons to adopt the categorical approach," one of which is "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Johnson*, 135 S. Ct. at 2562. Thus, *Johnson* does not prohibit all use of the "ordinary case." It only prohibits uses that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime.

Indeed, such an interpretation seems compelled in light of the fact that *Johnson* did not even mention *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377. In *Leocal*, the Supreme Court recognized the breadth of § 16(b) and noted that it "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense." *Id.* at 10, 125 S. Ct. 377.

Finally, I note that perhaps in an attempt to foreclose approaches such as that offered by today's majority in this appeal, the Supreme Court concluded by stating that its decision "does not call into question application of the Act to the four enumerated offenses [which include burglary] or the remainder of the Act's definition of a violent felony." *Johnson*, 135 S. Ct. at 2563.

III.

After such an esoteric discussion, it would be easy to lose sight of what is at issue in this case. Dimaya, a native and citizen of the Philippines, was twice convicted of first-degree residential burglary under California Penal Code § 459 and sentenced each time to two years in

prison. The Department of Homeland Security charged Dimaya with being removable because he had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which is a "crime of violence . . . for which the term of imprisonment [was] at least one year." That statute in turn defines "crime of violence" by reference to 18 U.S.C. § 16. Thus, we are asked whether the statutory scheme is somehow so vague or ambiguous as to preclude the BIA from concluding that Dimaya's two first-degree burglaries under California law are "crimes of violence" under § 16(b). Supreme Court precedent and our case law answer the question in the negative.

There is no uncertainty as to how to estimate the risk posed by Dimaya's burglary crimes. The Supreme Court held in *Leocal* that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S. Ct. 377. The court emphasized that burglary as "the classic example" of a crime covered by 16(b) because "burglary, by its nature involves a substantial risk that the burglar will use force against a victim in completing the crime."[10] *Id.* *See also Taylor*, 495 U.S. at 599, 110 S. Ct. 2143 (a person has been convicted of a crime for sentencing enhancement "if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unpriv-

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[10] This statement from *Leocal* forecloses, for purposes of § 16(b), attempts to distinguish burglary convictions based on statutes that cover structures other than dwellings or do not require unlawful entry. Neither of these distinctions change the "nature" of the offense nor ameliorates the "substantial risk that the burglar will use force against a victim in completing the crime."

ileged entry into, or remaining in, a building or structure, with intent to commit a crime").

We have consistently followed this line of reasoning. *See United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990) ("Any time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension."); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113 (9th Cir. 2011) (noting that "*Becker* itself recognized that the California crime of burglary might not be a 'crime of violence' under a federal statute defining the term by reference to the generic crime, even though it is a 'crime of violence' under the risk-focused text of § 16(b)"); *Chuen Piu Kwong*, 671 F.3d at 877 (reaffirming that "first-degree burglary under [Cal. Penal Code] § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense.").

Nor is there any uncertainty as to "how much risk it takes for a crime to qualify as a violent felony," *Johnson*, 135 S. Ct. at 2558, when burglary is at issue. Section 16(b) itself requires a "substantial risk" of the use of physical force. As noted, neither the Supreme Court nor the Ninth Circuit has had any trouble in applying this standard. *See Leocal*, 543 U.S. at 10, 125 S. Ct. 377; *Chuen Piu Kwong*, 671 F.3d at 877; *Becker*, 919 F.2d at 571. Any person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected. Is this not what the Supreme Court was referring to when it noted "we do not doubt the constitutionality of laws that call for the appli-

cation of a qualitative standard such as 'substantial risk' to real-world conduct"? *Johnson*, 135 S. Ct. at 2561.[11]

IV.

In *Johnson*, after nine years of trying to derive meaning from the residual clause, the Supreme Court held that it was unconstitutionally vague. Section 16(b) is not the ACCA's residual clause; nor has its standard proven to be unworkably vague. Over a decade ago, the Supreme Court in *Leocal* held that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S. Ct. 377. Moreover, as the Supreme Court recognized, the statute sets forth the test of a "substantial risk that physical force against the person or property of any may be used in the course of committing the offense." 18 U.S.C. § 16(b). Certainly, there is no unconstitutional vagueness in this case, which involves the hallmark "crime of violence," burglary. *See Leocal*, 543 U.S. at 10, 125 S. Ct. 377. The Supreme Court will be surprised to learn that its opinion in *Johnson* rendered § 16(b) uncon-

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[11] I am not alone in questioning the application of *Johnson* beyond the ACCA's residual clause. Although the opinion has only been on the books for a little over three months, the Eighth Circuit in *Ortiz v. Lynch*, 796 F.3d 932, 935 n.2 (8th Cir. 2015), noted that *Johnson* "does not implicate the analysis in this case where the analogous language comes not from the residual clause, but the first definition of 'violent felony' in ACAA." Similarly, in *In re Gieswein*, 802 F.3d 1143, No. 15-6138, 2015 WL 5534388 (10th Cir. Sept. 21, 2015), the Tenth Circuit noted that the holding in *Johnson* applies only to the residual-clause definition of violent felony. Although it did not reach the merits of the issue, the court noted that the "surviving definition of 'violent felony' under the ACCA includes a felony conviction for 'burglary.'" *Id.* at n.2.

stitutionally vague, particularly as its opinion did not even mention *Leocal* and specifically concluded with the statement limiting its potential scope.[12] I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit. Accordingly, I dissent.

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[12] There can be no doubt as to the majority's intent. Footnote 14 of the majority opinion asserts that "all of our prior cases relating to which offenses fall within the scope of [§ 16(b)] are to that extent of no further force or effect."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A043 888 256—El Centro, CA

IN RE JAMES GARCIA DIMAYA

Date: [Apr. 22, 2011]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Pro se

ON BEHALF OF DHS:
John D. Holliday
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F)) (withdrawn)

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of

aggravated felony (as defined in section 101(a)(43)(F))

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(G), (U))

APPLICATION:

Termination of proceedings, cancellation of removal

The respondent's appeal of the Immigration Judge's November 1, 2010, decision finding him removable and pretermitting his application for relief from removal will be dismissed. The fee waiver request is granted.

The respondent is a 31-year-old native and citizen of the Philippines who was admitted as a lawful permanent resident on or about December 24, 1992. He was convicted on June 8, 2007, in the California Superior Court, Alameda County, of felony first degree burglary in violation of California Penal Code § 459 (CPC) and sentenced, after a probation violation, to 2 years in prison. Exhs. 1 and 3. On July 24, 2009, he was convicted again in the same court of first degree felony burglary in violation of CPC § 459. Exh. 2. The June 8, 2010, Notice to Appear charged the respondent with being removable as an alien convicted of an aggravated felony. (Exh. 1). The lodged charges accused him of being removable for having committed two crimes involving moral turpitude (CIMT), and of being removable as an aggravated felon because he was convicted of an attempted theft or burglary offense for

which the term of imprisonment is at least 1 year, and because he was convicted of a crime of violence. Exh. 4. Sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii) and 101(a)(43)(G), (U) and (F) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), and 1101(a)(43)(G), (U) and (F). Removability must be shown by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3). The Board may reverse a finding of fact only if it is clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

The Immigration Judge found the respondent removable as one convicted of an aggravated felony involving an attempted theft offense in 2009, and of two crimes involving moral turpitude, and, that the charging documents for both offenses showed the respondent was convicted of a crime of violence by reason of his unlawful entry to a residence. Therefore, because he was convicted of an aggravated felony, the respondent was ineligible for cancellation of removal. *See* sections 237(a)(2)(A)(iii) and 240A(a)(3) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1229b(a)(3). The respondent argues that his burglary convictions do not qualify as aggravated felonies, because the record does not demonstrate he committed generic burglary or theft, and that neither burglary was a crime of moral turpitude. He notes that the burglary statute does not require a finding that he entered unlawfully as required for generic burglary, or that the location was a residence, so he was not convicted of a crime of violence. He also points out that the statute only requires intent to commit any felony, and that the information for the first conviction only alleged intent to commit any felony, which may not be a crime involving moral turpitude. He maintains it was error to rely on the facts set out in the probation reports.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has concluded that in cases wherein the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, a modified categorical approach is followed involving a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that an alien was convicted of the elements of the generically defined crime. *See Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002); *see also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (noting that "charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment may suffice to document the elements of conviction" under the modified categorical approach). On the other hand, if the statute of conviction is lacking an element of the generic offense, the modified categorical approach may not be used to find that missing element. *Aguilar-Turcios v. Holder*, 582 F.3d 1093 (9th Cir. 2009); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). In addition, under the modified categorical approach, a pre-sentence report alone is not sufficient to demonstrate the elements of the crime of which the respondent was convicted. *Penuliar v. Mukasey*, 528 F.3d 603, 611 (9th Cir. 2008); *see, e.g., United States v. Vidal*, 504 F.3d 1072, 1087 n.25 (9th Cir. 2007) (*en banc*) (*citing United States v. Franklin*, 235 F.3d 1165, 1171 (9th Cir. 2000) (explaining that a pre-sentence report, even when considered in conjunction with charging papers, is insufficient to establish what facts a defendant admitted in his plea); *see also United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir.

2003); *Huerta-Guevara v. Ashcroft*, *supra*, at 888 judicial admission not sufficient).

CPC § 459 states that: "[e]very person who enters any house, room, ... shop, warehouse, store, mill, barn, ... tent, vessel, ... railroad car, ... or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary ... ." The statute does not define a generic burglary offense and is broader than the definition of a crime involving moral turpitude or a crime of violence. According to the abstracts of judgment for both convictions, the respondent pled guilty to first degree residential burglary in violation of CPC § 459.

Generic burglary requires that a state statute contain, at minimum, the elements of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, *supra*. The California statute does not require an unlawful entry necessary for generic burglary. *See United States v. Vidal*, *supra*, at 1088-89. We cannot look to the modified categorical approach to supply a missing element of the crime for purposes of finding generic burglary, an aggravated felony. *Aguilar-Turcios v. Holder*, *supra*.

On the other hand, the modified categorical approach may be used to narrow the application of the statute in a particular case for purposes of finding the respondent was convicted of an aggravated felony crime of violence. *See Young v. Holder*, — F.3d —, 2011 WL 257898 at 5 n.14 (9th Cir. 2011). Under 18 U.S.C. § 16(b), a crime of violence is: "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be

used in the course of committing the offense." The charging document and the abstract of judgment in the first case reference first degree residential burglary. The information charges that the respondent: "did unlawfully enter an inhabited dwelling house and trailer coach and inhabited portion of a building . . . with the intent to commit any felony." Entering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force. *See United States v. Becker*, 919 F.2d 568, 571 n.5 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991) (first degree burglary implies entry with intent to act against the person or property of another); *see also United States v. Smith*, 390 F.3d 661 (9th Cir. 2004), *amended by*, 405 F.3d 726 (9th Cir. 2005) (no contest plea conviction to burglary in California qualified as a prior violent felony conviction under the Armed Career Criminal Act). As noted in *United States v. Becker*, *supra*, at 571, "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension," *United States v. M C.E.*, 232 F.3d 1252, 1256 (9th Cir. 2000) (residential burglary is a crime of violence under 18 U.S.C. § 5032, which is "virtually identical" to 18 U.S.C. § 16, because of the substantial risk that physical force may be used in committing the offense); *see also James v. United States*, 550 U.S. 192 (2007).

Therefore, we find that the Immigration Judge correctly held that the Department of Homeland Security (the "DHS") sustained its burden in establishing that respondent is removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony as

that term is defined under section 101(a)(43)(F) of the Act.

If the respondent is applying for relief from removal, the burden is on the respondent to prove every element required under the statute including that his conviction was not an aggravated felony. *Matter of Almanza-Arenas*, 24 I&N Dec. 771, 775-76 (BIA 2009). The record of conviction, as noted above, demonstrates he was convicted of an aggravated felony which would bar him from cancellation of removal. *See* sections 237(a)(2)(A)(iii) and 240A(a)(3) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1229b(a)(3).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

Board Member Linda S. Wendtland concurs in the result, but respectfully dissents from the majority opinion to the extent that it holds either that (1) even if unlawful entry was not an element of the respondent's residential burglary offense, the modified categorical approach may be used to ascertain that the offense in fact involved an unlawful entry and therefore was a crime of violence, or that (2) a crime of violence exists even without an unlawful entry. The former proposition does not comport with the law of the United States Court of Appeals for the Ninth Circuit, under which the modified categorical approach may not be used when the crime of conviction is missing an element of the generic crime. See Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc); 18 U.S.C. section 16(b) (where use, attempted use, or threatened use of physical force is not

an element of the offense of conviction, the offense must, inter alia, "by its nature" involve a substantial risk that physical force may be used). The latter proposition is incorrect because, in my view, a burglary not involving an unlawful entry does not create a sufficient risk of the use of force to qualify as a crime of violence. Nevertheless, I concur with the majority's ultimate conclusion that the respondent's residential burglary offense is a crime of violence and thus an aggravated felony (given the sentence to at least 1 year of imprisonment), in view of the Ninth Circuit's determinations in United States v. Becker, 919 F.2d 568, 571 n.5 (9th Cir. 1990), that California law implicitly requires an unlawful entry as a prerequisite to a residential burglary conviction, and that in view of this and other factors, such a conviction under California Penal Code sec. 459 constitutes a crime of violence. That is, the Ninth Circuit has opined at least in Becker that unlawful entry is an implicit—rather than a missing —element of an offense under the California statute at issue.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
El Centro, California

File A 43 888 256

IN THE MATTER OF JAMES GARCIA DIMAYA, RESPONDENT

Filed: Nov. 1, 2010

IN REMOVAL PROCEEDINGS

CHARGE:

Sections 237(a)(2)(A)(iii) (aggravated felony crime of violence), Immigration and Nationality Act (INA); lodged charges, Section 237(a)(2)(A)(ii) (two crimes of moral turpitude) INA; 237(a)(2)(A)(iii) (attempted thief offense, aggravated felony) INA; 237(a)(2)(A)(iii) (crime of violence, aggravated felony) INA

APPLICATION:

Termination

APPEARANCES:

ON BEHALF OF RESPONDENT:

Pro Se

ON BEHALF OF THE DEPARTMENT OF HOME LAND SECURITY:

John Holliday, Esquire
1115 No. Imperial Avenue
El Centro, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a thirty-one-year old man who is a native and citizen of the Philippines and who has been a legal permanent resident of the United States since December of 1992. The Immigration authorities began removal proceedings by filing a Notice to Appear on July 12, 2010, with this Court. The Government alleged that the Respondent was removable because he had been convicted of an aggravated felony which is a crime of violence. The Notice to Appear was properly served. Exhibit 1. The Notice to Appear described the offense as a first degree burglary for which the Respondent was sentenced to two years. A conviction was said to have occurred on June 8, 2007.

On October 14, the matter came on for hearing. The Respondent was not represented. I explained to him the rights to which he is entitled and the allegations and the charge against him. The Respondent said he understood the rights, allegations and charge. He chose to represent himself. I called on him then to admit or deny the allegations. The Respondent admitted all the allegations. The Government corroborated his admissions with some conviction documents.

Exhibit #2 shows the Respondent was convicted of first degree residential burglary on July 24, 2009. That particular conviction is not the conviction which was alleged in the Notice to Appear. However, that convic-

tion does show that the Respondent was convicted of a first degree residential burglary and sentenced to two years, and he was convicted of count one. Count one in the attached warrant says that the Respondent did unlawfully enter an inhabited dwelling with intent to commit larceny and any felony.

Exhibit 3 shows that the Respondent was convicted of first degree residential burglary, also committed in 2007. He was sentenced to two years after a revocation of probation. This appears to be the offense that was actually described in the Notice to Appear.

The attached complaint, however, shows that the Respondent did unlawfully enter an inhabited dwelling house with the intent to commit any felony. Specifically, the language larceny and any felony was struck and then by interlineation the information had been amended to say any felony.

Although I had initially sustained the Government's charge, the Government asked ~~me~~ to lodge additional charges and in effect to clean up the problems that they detected.

On November 1, 2010, the matter came on again for hearing. Again, the Respondent was not represented. He waived his opportunity to be represented and chose to proceed. The Government lodged additional allegations and charges. Exhibit 4. The Respondent was served in open court on that very day. However, he declined any further continuance to prepare a defense. He elected once again to represent himself. I called on him then to admit or to deny the allegations which were filed in lieu of the original charges and allegations.

Respondent admitted all the allegations. The new allegations and charges, however, were more extensive than those originally charged. The Respondent admitted that he had been convicted in 2007 of a first degree burglary and he admitted that he had been convicted of first degree burglary in 2009. The new allegations, however, allege that the Respondent was convicted of two crimes of moral turpitude not arising in the same scheme of criminal misconduct. Not all burglaries, however, are involving moral turpitude. The issue came to the fore because the Respondent's conviction in 2007 specifically removed larceny as the purpose for entry.

In determining whether a crime is one involving moral turpitude, the Court has historically been limited to the offense definition and then the documents associated with the conviction. However, in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) the Attorney General specifically expanded the collection of sources that the Court might use in reaching its conclusion. The Attorney General determined that since moral turpitude is not an element of any particular crime, that the Court can resort to information outside the usual documents and applied in modified categorical searches of the past. At the Government's invitation then I considered the probation officer's report which was attached to the Exhibit #3. Specifically, the portion of the report which is found on page nine of Exhibit #3. I inquired of the Respondent as to that particular recitation which is found in the section entitled "evaluation," whether it was true that he had entered the victim's home through a bathroom window and burglarized the victim's home twice and had taken several items from the home which he sold. The Re-

spondent agreed that that was the reality of the offense connected to this offense. Consequently, I find that this offense is a crime of moral turpitude. He entered clearly with intent to commit theft and did commit a theft and thereafter a sale of the taken property.

Exhibit #2 is less directly problematic because it uses language which is the conjunctive. That is, it is alleged that he did enter with intent to commit larceny "and" any felony. I find that that language makes it clear that at least part of the reason for his entry was to commit a larceny as well as some other felony. Thus, his offense is a crime of moral turpitude. Since he testified that these crimes were not planned at the same time, that they were not involving the same victim, and that they did not occur on the same day, I find that they did not arise in the same scheme of criminal misconduct. Consequently, he is removable because he was convicted of two or more crimes of moral turpitude not arising from the same scheme of criminal misconduct.

I next considered whether the Respondent was removable because he had been convicted of an aggravated felony relating to an attempted theft offense. I find the modified categorical approach that the Respondent's 2009 conviction is first of all an attempted theft offense with a sentence of a year or more. His entry into the dwelling house was with the intent to commit larceny and any felony. Since again the intent was to commit some larceny, then his entry was an attempt to commit a theft. Since the sentence is more than a year it is an aggravated felony.

I also considered both of the convictions to be crimes of violence under 18 U.S.C. 16(b). Each of

these is a felony offense. Moreover, the unlawful entry into a residence is by its very nature an offense where is apt to be violence, whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon. Therefore, since the sentence was more than a year, I find that this is an aggravated felony because it is a crime of violence. For that, I also rely upon the case U.S. v. Becker, 919 F.2d 568, 573 (9th Circuit 1990).

Based on the Respondent's admissions and all the evidence and the testimony of record, I find that the allegations are true. Respondent is therefore removable as charged. He designated the Philippines as the country of removal. He said he had no fear of torture or persecution there. I accept this designation.

The Respondent's convictions for an aggravated felony makes him ineligible for any relief even though he has been a legal resident for nearly 18 years. He is ineligible for cancellation of removal as a legal permanent resident. See Section 240A(a) INA; ineligible for voluntary departure under Section 240B(a)&(b); ineligible to adjust his status through any citizen family member or legal resident family member because he has convictions for burglary are crimes of moral turpitude requiring a waiver under Section 212(h). Section 212(h) is unavailable to an alien who is a legal resident and who has been convicted of an aggravated felony. I am unaware of any relief which is available under circumstances such as these. Therefore, after having considered all the evidence of record I must make the following orders.

ORDERS

IT IS THEREFORE ORDERED that the Respondent be removed from the United States to the Philippines based on the allegations and charges in the lodge charge.

/s/ JACK STATON
JACK STATON
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-71307
Agency No. A043-888-256

JAMES GARCIA DIMAYA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

Filed: [Jan. 25, 2016]

ORDER

Before: REINHARDT, WARDLAW, and CALLAHAN, Circuit Judges.

Judge Reinhardt and Judge Wardlaw voted to deny Respondent's petition for rehearing en banc, while Judge Callahan voted to grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition. *See* Fed. R. App. P. 35.

Respondent's petition for rehearing en banc, filed November 18, 2015, is **DENIED**.

APPENDIX E

1. U.S. Const. Amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private ı roperty be taken for public use, without just compensation.

2. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

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[5] So in original. Probably should be preceded by "is".

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[6] least one year;

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens.

(a) Classes of deportable aliens

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * * * *

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the

term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

6. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For the purposes of this subsection, the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

* * * * *

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-1498

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

JAMES GARCIA DIMAYA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Armed Career Criminal Act's (ACCA) "residual clause" defines a "violent felony" as a felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Last year, this Court held the ACCA residual clause void for vagueness because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," which yields unpredictable and arbitrary results. *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015). This case involves a separate criminal statute, 18 U.S.C. § 16, with a similar residual clause. Section 16's residual clause defines a "crime of violence" as an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). Like the ACCA residual clause, the § 16 residual clause requires that courts construct a judicially imagined "ordinary case" of a given offense, and then determine whether the "risk" of physical force posed by that judicial abstraction is sufficiently "substantial."

The petition presents two questions:

1. Whether *Jordan v. De George*, 341 U.S. 223 (1951), should be overruled, such that *Johnson*'s void-for-vagueness analysis would not apply to 18 U.S.C. § 16 in this immigration case.

2. If not, whether the residual clause contained in 18 U.S.C. § 16 is unconstitutionally vague under *Johnson*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

REASONS TO DENY CERTIORARI 10

I. The Court Of Appeals' Decision Is Correct And Follows From A Straightforward Application Of *Johnson*. 11

II. The Government's Efforts To Distinguish *Johnson* Fail, And Only Highlight That An Immigration Case Is A Poor Vehicle To Review The Constitutionality Of The § 16 Residual Clause, A Criminal Statute. 15

A. The government's threshold question presented regarding the void-for-vagueness standard is not certworthy, is foreclosed by precedent, and could stand in the way of this Court's consideration of the *Johnson* question presented. 16

B. The minor textual differences between the ACCA's residual clause and the § 16 residual clause are immaterial and if anything compound the latter's vagueness. 20

C. Like the ACCA provision in *Johnson*, the § 16 residual clause has generated substantial confusion. 25

III. This Court's Review Would Be Premature Because The Courts Of Appeals Have Only Just Begun To Evaluate Other Provisions Under *Johnson*. 27

IV. The Government Overstates The Effect Of The Court Of Appeals' Decision. 31

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Aguilar v. Att'y Gen.,
663 F.3d 692 (3d Cir. 2011) 23

Alphonsus v. Holder,
705 F.3d 1031 (9th Cir. 2013) 17

Beslic v. INS,
265 F.3d 568 (7th Cir. 2001) 17

Chambers v. United States,
555 U.S. 122 (2009) 12

Clark v. Martinez,
543 U.S. 371 (2005) 18

De La Paz Sanchez v. Gonzales,
473 F.3d 133 (5th Cir. 2006) 26

Derby v. United States,
131 S. Ct. 2858 (2011) 26

Escudero-Arciniega v. Holder,
702 F.3d 781 (5th Cir. 2012) 26

Fernandez-Ruiz v. Gonzales,
466 F.3d 1121 (9th Cir. 2006) 23

Flores v. Ashcroft,
350 F.3d 666 (7th Cir. 2003) 22

James v. United States,
550 U.S. 192 (2007) 7, 13

Jimenez-Gonzalez v. Mukasey,
548 F.3d 557 (7th Cir. 2008) 12, 23

Johnson v. United States,
135 S. Ct. 2551 (2015) ..... i, 1, 8, 9, 11, 13, 21, 24, 25, 28, 33

Johnson v. United States,
559 U.S. 133 (2010) 12, 21

Jordan v. De George,
341 U.S. 223 (1951) ..... i, 2, 16, 17, 19

Karimi v. Holder,
715 F.3d 561 (4th Cir. 2013) 22

Lawrence v. Chater,
516 U.S. 163 (1996) 26

Leocal v. Ashcroft,
543 U.S. 1 (2004) 12, 18, 23

In re Louissaint,
24 I. & N. Dec. 754 (BIA 2009) 32

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 15

Padilla v. Kentucky,
559 U.S. 356 (2010) 17

People v. Little,
206 Cal. App. 4th 1364 (2012) 14

People v. Nguyen,
40 Cal. App. 4th 28 (1995) 14

People v. Saint-Amans,
131 Cal. App. 4th 1076 (2005) 14

Sareang Ye v. INS,
214 F.3d 1128 (9th Cir. 2000) 26

Shuti v. Lynch,
No. 15-3835, 2016 WL 3632539
(6th Cir. July 7, 2016) 27, 28, 29, 30

Singh v. Ashcroft,
386 F.3d 1228 (9th Cir. 2004) 22

Solorzano-Patlan v. INS,
207 F.3d 869 (7th Cir. 2000) 26

United States v. Alvarez,
132 S. Ct. 2537 (2012) 31

United States v. Becker,
919 F.2d 568 (9th Cir. 1990) 5

United States v. Castleman,
134 S. Ct. 1405 (2014) 21, 22, 23

United States v. Gonzalez-Longoria,
No. 15-40041, 2016 WL 4169127
(5th Cir. Aug. 5, 2016) 30

United States v. Hill,
No. 14-3872, 2016 WL 4120667
(2d Cir. Aug. 3, 2016) 29

United States v. Portela,
469 F.3d 496 (6th Cir. 2006).....23

United States v. Prickett,
No. 15-3486, 2016 WL 4010515
(8th Cir. July 27, 2016).....29

United States v. Sanchez-Espinal,
762 F.3d 425 (5th Cir. 2014).....23

United States v. Sanchez-Garcia,
501 F.3d 1208 (10th Cir. 2007).....26

United States v. Scudder,
648 F.3d 630 (8th Cir. 2011).....12

United States v. Swisher,
811 F.3d 299 (9th Cir. 2016).....31

United States v. Taylor,
814 F.3d 340 (6th Cir. 2016).....27

United States v. Vivas-Ceja,
808 F.3d 719 (7th Cir. 2015).....18

United States v. Zuniga-Soto,
527 F.3d 1110 (10th Cir. 2008).....23

Vartelas v. Holder,
132 S. Ct. 1479 (2012).....17

Voisine v. United States,
136 S. Ct. 2272 (2016).....23

Welch v. United States,
136 S. Ct. 1257 (2016).....3, 11, 25, 29

Whyte v. Lynch,
807 F.3d 463 (1st Cir. 2015) 22

Statutes

Immigration and Nationality Act

8 U.S.C. § 1101(a)(43) 4

8 U.S.C. § 1101(a)(43)(A) 32

8 U.S.C. § 1101(a)(43)(B) 32

8 U.S.C. § 1101(a)(43)(C) 32

8 U.S.C. § 1101(a)(43)(F) 4, 18

8 U.S.C. § 1101(a)(43)(G) 4, 32

8 U.S.C. § 1101(a)(43)(H) 32

8 U.S.C. § 1227(a)(2)(A)(ii) 32

8 U.S.C. § 1227(a)(2)(A)(iii) 4

8 U.S.C. § 1326(a) 18

8 U.S.C. § 1326(b)(2) 18

18 U.S.C. § 16 ..... *passim*

18 U.S.C. § 16(a) 21, 33

18 U.S.C. § 16(b) 7, 9. 12, 23

18 U.S.C. § 704(a) 31

Armed Career Criminal Act

18 U.S.C. § 922(g)(9) 21

18 U.S.C. § 924(c)(1)(A) 28

18 U.S.C. § 924(c)(3)(B) 27, 28, 29, 30

18 U.S.C. § 924(e)(2)(B) 1, 8

18 U.S.C. § 924(e)(2)(B)(i) 21

18 U.S.C. § 924(e)(2)(B)(ii) 24

California Penal Code § 459 3

Other Authorities

Ira J. Kurzban, *Immigration Law Sourcebook* (15th ed. 2016) 26

Supplemental Brief for the United States, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120) 12, 24

INTRODUCTION

In *Johnson v. United States*, this Court invalidated the "residual clause" in the Armed Career Criminal Act, which defined a "violent felony" as one that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Because that clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," this Court concluded that it "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." 135 S. Ct. 2551, 2557-58 (2015).

This case concerns the analogous residual clause in 18 U.S.C. § 16, which defines a "crime of violence" as a felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." There is no dispute that, like the ACCA's residual clause, the § 16 residual clause requires courts to assess the risk posed by a judicially imagined "ordinary case" of a crime. Accordingly, as the Sixth, Seventh, and Ninth Circuits have correctly held, the § 16 residual clause is also unconstitutionally vague under a straightforward application of *Johnson*.

Given how squarely *Johnson* controls that question, it is understandable that the government interposes a threshold question unrelated to the § 16 residual clause itself. The government argues that, because in this case the § 16 residual clause operates in the context of an immigration proceeding, the

Court of Appeals should have assessed the clause under a less stringent vagueness standard, and that under that watered-down standard, the § 16 residual clause should stand where the ACCA's residual clause failed. But the government asserts no circuit conflict on that question. And accepting the government's argument would require this Court to overrule a 65-year-old precedent applying the "established criteria of the 'void for vagueness' doctrine" to an immigration statute in light of the "grave nature of deportation." *Jordan v. De George*, 341 U.S. 223, 231 (1951).

To the extent the immigration context of this case is relevant at all, it is only that an immigration case is a poor vehicle for this Court to pass upon the constitutionality of the § 16 residual clause, a criminal statute. Unlike in a criminal case involving § 16, this Court would have to grapple with the government's threshold question presented before reaching the question on which the government asserts a circuit conflict over the § 16 residual clause's constitutionality.

When the government does address the merits of the vagueness question, it fastens onto two textual differences that, it claims, distinguish the § 16 residual clause from the ACCA's residual clause: The ACCA referred to a risk of "physical injury," whereas § 16 refers to the risk that "physical force" may be "used"; and the ACCA's residual clause was preceded by a list of four specific examples of "violent felon[ies]," whereas § 16 lacks any such examples. But, if anything, these distinctions merely compound the § 16 residual clause's indeterminacy, rendering its application even *more* arbitrary and

unpredictable, not less, than the ACCA provision. And neither feature was central to this Court's reasoning in *Johnson* in any event. As this Court recently reiterated in *Welch v. United States*, "[t]he [ACCA] residual clause failed ... because applying [a 'serious potential risk'] standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. 1257, 1262 (2016). The same is true of § 16's residual clause.

Finally, review at this time would be premature. The government points (Pet. 26-27) to a decision of the Sixth Circuit concerning a different statute, but in the short time since the government filed its petition for certiorari, the Sixth Circuit has held that it agrees with the Seventh and Ninth Circuits insofar as § 16's residual clause is concerned. Meanwhile, the Fifth Circuit has since adopted the government's position on § 16. But with *Johnson* and *Welch* having been decided so recently, and with the Courts of Appeals actively considering their implications, further percolation is warranted.

The petition should be denied.

STATEMENT

1. James Garcia Dimaya was admitted to the United States as a lawful permanent resident in 1992, when he was 13 years old. Pet. App. 42a. In 2007 and again in 2009, he was convicted of felony first-degree burglary in violation of California Penal Code § 459. Pet. App. 42a. The government began deportation proceedings against Dimaya in 2010. Pet. App. 42a.

The Immigration and Nationality Act provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" is defined by reference to a long list of specified offenses. *See* 8 U.S.C. § 1101(a)(43). The definition includes "a theft offense ... or burglary offense for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(G).

A "crime of violence ... for which the term of imprisonment [is] at least one year" is also an "aggravated felony." 8 U.S.C. § 1101(a)(43)(F). A "crime of violence" is defined, in turn, by a reference to a criminal statute, 18 U.S.C. § 16. That provision supplies the general definition of a "crime of violence" for the criminal code:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The government alleged that Dimaya's California burglary convictions were aggravated felonies, because each was "an attempted theft or burglary offense" and a "crime of violence." Pet. App. 42a-43a. The government also alleged the convictions were "crimes of moral turpitude." Dimaya appeared pro se

before an immigration judge. Pet. App. 49a. The immigration judge found Dimaya removable, agreeing with the government on each point. Pet. App. 49a-55a. With respect to the "crime of violence classification," the immigration judge concluded that "the unlawful entry into a residence is by its very nature an offense where [there] is apt to be violence, whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon." Pet. App. 54a. To conclude that California burglary requires unlawful entry, the immigration judge relied upon *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991), which held that California courts recognize an implicit element of unlawful entry even though the California statute does not expressly "require that the entry itself be illegal for a defendant to be convicted of burglary." *Id.* at 571 n.5; *see* Pet. App. 54a.

2. Dimaya filed a pro se appeal with the Board of Immigration Appeals. The Board dismissed Dimaya's appeal, finding him removable based on the "crime of violence" aspect of the definition of an "aggravated felony," and not reaching the immigration judge's alternative grounds. Pet. App. 46a-47a. The Board agreed with Dimaya that "[t]he California statute" under which he was convicted "does not require an unlawful entry necessary for generic burglary." Pet. App. 45a. The Board nevertheless observed that "[t]he charging document and the abstract of judgment ... reference first degree residential burglary," and concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force." Pet. App. 46a.

One Board member separately concurred in the result. She disagreed with the suggestion that a burglary offense could be considered a crime of violence even if it does not require an unlawful entry. "[A] burglary not involving an unlawful entry," she observed, "does not create a sufficient risk of the use of force to qualify as a crime of violence." Pet. App. 48a. She nevertheless concurred because she believed, based on the same Ninth Circuit precedent on which the immigration judge had relied, that "California law implicitly requires an unlawful entry as a prerequisite to a residential burglary conviction." Pet. App. 48a.

3. Still proceeding pro se, Dimaya filed a petition for review in the Ninth Circuit. Pet. App. 4a. Shortly afterwards, the court appointed counsel to represent him. Briefing before the Court of Appeals began shortly after this Court's decision in *Descamps v. United States*, which addressed whether the California burglary statute under which Dimaya was convicted was a "burglary" as that term is used in the definition of a "violent felony" in the ACCA. 133 S. Ct. 2276 (2013).

Descamps observed that California's burglary statute does not require proof of unlawful entry as an element, and concluded that "a conviction under that statute is never for generic burglary" under the ACCA. *Id.* at 2293. The first round of briefing before the Court of Appeals in this case, therefore, focused on *Descamps*'s impact on prior Ninth Circuit cases holding that California's burglary statute is a "crime of violence" under the § 16 residual clause. In that briefing, the government stressed that "the

'substantial risk' clause is not unique to § 16(b)," and observed that "a variant of the clause appears in the ... Armed Career Criminal Act ('ACCA')." C.A. Government Brief at 26.[1] The government stated that "the ACCA ... appl[ies] the same essential analysis as under section 16(b)," and that, as a result, "the Supreme Court's insight that 'the ACCA does not require metaphysical certainty and contains inherently probabilistic concepts,' applies equally to a section 16(b) case." *Id.* (quoting *James v. United States*, 550 U.S. 192, 207 (2007)).

In January 2015, this Court ordered supplemental briefing in *Johnson v. United States* on whether the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. 939 (2015). As a result, the Court of Appeals held this case in abeyance pending this Court's decision in *Johnson*.

In June 2015, this Court then struck down the ACCA's residual clause in *Johnson*. ACCA defined a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves*

---

[1] Documents preceded by "C.A." were filed in the court of appeals.

> *conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). The italicized language is the ACCA's "residual clause."

Johnson identified "[t]wo features of the residual clause [that] conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, the residual clause yields "grave uncertainty about how to estimate the risk posed by a crime" because it requires courts to assess the risk posed by "a judicially imagined 'ordinary case' of a crime, not ... real-world facts or statutory elements." *Id.* Second, the residual clause also leaves "uncertainty about how much risk it takes for a crime to qualify as a violent felony," because it compels courts to apply an "imprecise 'serious potential risk' standard" to a "judge-imagined abstraction." *Id.* at 2558. This Court concluded that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

4. Following supplemental briefing and oral argument, the Court of Appeals concluded that the § 16 residual clause "suffers from the same indeterminacy as ACCA's residual clause," and accordingly struck down the § 16 residual clause as unconstitutionally vague under *Johnson*. Pet. App. 2a. The court began by observing that the language of the § 16 residual clause is "similar" to the ACCA's residual clause, and that both provisions "are subject

to the same mode of analysis." Pet. App. 8a. Like the ACCA's residual clause, the § 16 residual clause requires courts to construct a judicially imagined "ordinary case" of a crime. And, much as the ACCA's residual clause required that courts subject that judicially imagined "ordinary case" to an imprecise "serious potential risk" standard, the § 16 residual clause compels courts to determine whether the risk that "physical force" may be "used" in the course committing an imagined ordinary offense is sufficiently "substantial." Pet. App. 8a, 12a-13a. "As with ACCA's residual clause," therefore, "§ 16(b)'s definition of a crime of violence[] combines 'indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as' a crime of violence." Pet. App. 13a-14a (quoting *Johnson*, 135 S. Ct. at 2558). Accordingly, the Court of Appeals concluded that the § 16 residual clause is likewise unconstitutionally vague, and remanded the case to the Board to consider the immigration judge's alternative grounds for finding Dimaya removable. Pet. App. 2a n.1, 20a.

Judge Callahan dissented. She agreed that the § 16 residual clause, like the ACCA's residual clause, requires that courts assess the risk posed by a judicially imagined "ordinary case" of the offense. Pet. App. 35a. Judge Callahan noted, however, that the ACCA's residual clause was preceded by a list of four specific crimes, which she believed were crucial to this Court's determination in *Johnson* that the clause that followed them left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Pet. App. 35a (quoting *Johnson*, 135 S. Ct. at 2557-58).

Judge Callahan also observed that the § 16 residual clause has not generated the same body of confusing case law before this Court that the ACCA's residual clause had before it was struck down. Pet. App. 39a-40a.

The government petitioned for rehearing en banc, raising many of the arguments for distinguishing *Johnson* presented in its petition for certiorari. The court of appeals denied the petition with no judge so much as calling for a vote. Pet. App. 56a.

REASONS TO DENY CERTIORARI

This Court should deny certiorari for three reasons. First, the court of appeals' decision embodies a correct and straightforward application of *Johnson* to a statute that has consistently been recognized—including by the government itself—as analogous to the ACCA residual clause. Second, neither of the arguments that the government offers in an effort to distinguish *Johnson* raises an issue warranting this Court's review. The government's principal argument—that deportation statutes should be assessed under a diluted form of vagueness review—would require that this Court overturn a 65-year-old precedent whose underpinnings this Court has consistently reaffirmed. That question does not merit this Court's review, and it only highlights that an immigration case is not a proper vehicle to consider the constitutionality of the § 16 residual clause, a criminal statute. The government's alternative argument—that the minor textual distinctions between the § 16 residual clause and the ACCA's residual clause dictate a different outcome under the

vagueness inquiry—fails because those distinctions merely compound the statute's vagueness, to the extent they are meaningful at all. Third, this Court's review would be premature, as demonstrated by the developments in the courts of appeals just since the government filed its petition.

In the short time since *Johnson*, this Court has already considered one sequel to that case and granted review in another. *See Welch v. United States*, 136 S. Ct. 1257 (2016); *Beckles v. United States*, No. 15-8544. It does not need a fourth installment, on a question on which the court of appeals correctly applied *Johnson*'s holding to a materially identical statute.

I. The Court Of Appeals' Decision Is Correct And Follows From A Straightforward Application Of *Johnson*.

In *Johnson*, this Court made clear that its decision to strike down the ACCA's residual clause hinged on "[t]wo features of the residual clause [that] conspire to make it unconstitutionally vague": (1) the uncertainty inherent in deciding "what kind of conduct the 'ordinary case' of a crime involves"; and (2) the "uncertainty about how much risk it takes for a crime to qualify as a violent felony." 135 S. Ct. at 2557-58.

The § 16 residual clause shares both of those features. Just like the ACCA's residual clause, the § 16 residual clause "requires [courts] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [an

individual's] crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). The government concedes that the ACCA's residual clause and the § 16 residual clause are "similar to that extent." Pet. 20. And like the ACCA's residual clause, the § 16 residual clause demands that this judicially imagined "ordinary case" be evaluated according to an imprecise "risk" standard. This Court has consistently identified the two residual clauses as "very similar" because of these commonalities. *Johnson v. United States*, 559 U.S. 133, 140 (2010); *see, e.g., Chambers v. United States*, 555 U.S. 122, 133 n.2 (2009) (Alito, J., concurring) ("18 U.S.C. § 16(b) ... closely resembles ACCA's residual clause"); *see also* C.A. Government Brief at 26 ("[T]he ACCA ... appl[ies] the same essential analysis as under section 16(b)."); *United States v. Scudder*, 648 F.3d 630, 634 (8th Cir. 2011) (applying case law involving the ACCA's residual clause in a case involving the § 16 residual clause); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (same).

The Court of Appeals' determination that the § 16 residual clause is unconstitutionally vague follows directly from *Johnson*. Indeed, the government recognized as much in litigating *Johnson* before this Court. The government argued that the § 16 residual clause "is equally susceptible to petitioner's central objection to the [ACCA] residual clause," because both statutes require an assessment of "the risk of confrontations and other violent encounters" posed by a judicially imagined "ordinary case" of a given offense. Supplemental Brief for the United States at 22-23, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120). And although this Court in *Johnson* distinguished most of the examples that the

government cited of laws that "use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'" (such as state reckless-endangerment laws), it did not distinguish § 16. *Johnson*, 135 S. Ct. at 2561. This Court distinguished the other examples because they merely "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," whereas the ACCA's residual clause "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Id.* at 2561. But § 16's residual clause applies in the same way, as the government recognizes. Accordingly, the government has properly conceded away the only plausible basis for distinguishing the § 16 residual clause from the ACCA's residual clause.

To demonstrate the unpredictability of an analysis that ties a judicial assessment of risk to a judicially imagined "ordinary case" of a crime, *Johnson* pointed to attempted burglary. Does the "ordinary case" of attempted burglary involve circumstances where "[a]n armed would-be burglar [is] spotted by a police officer, a private security guard, or a participant in a neighborhood watch program"? 135 S. Ct. at 2558 (quoting *James*, 550 U.S. at 211). Or does it involve circumstances where "a homeowner ... give[s] chase, and a violent encounter ... ensue[s]"? *Id.* (quoting *James*, 550 U.S. at 211). Or, alternatively, does it involve "nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away"? *Id.* (quoting *James*, 550 U.S. at 226 (Scalia, J., dissenting)). Because "[t]he residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves," it produces a

constitutionally impermissible level of unpredictability and arbitrariness. *Id.*

The same is true of the § 16 residual clause. Consider Dimaya's crime of conviction, California burglary. As this Court recognized in *Descamps*, California's burglary statute bears little resemblance to traditional burglary. "[B]urglary statutes generally demand breaking and entering or similar conduct," but California's does not. *Descamps*, 133 S. Ct. at 2282. Rather, the California statute "sweep[s] so widely" that it encompasses "a shoplifter['s] enter[ing] a store, like any customer, during normal business hours," *id.*, a person's entering a dwelling with the intent to purchase items using a bad check, *People v. Nguyen*, 40 Cal. App. 4th 28, 30-35 (1995), or entering an open house and taking a real estate agent's wallet out of her purse, *People v. Little*, 206 Cal. App. 4th 1364, 1367-70 (2012). It even covers a customer legally entering a bank to withdraw money that he has fraudulently transferred to his account. *People v. Saint-Amans*, 131 Cal. App. 4th 1076, 1079-80 (2005); *see also* Pet. App. 11a n.7 (noting only 7% of burglaries involve incidents of violence). What the "ordinary case" of California burglary involves, and how much risk of force it poses, is anyone's guess.

The § 16 residual clause, like the ACCA's residual clause, offers no reliable way of resolving this question. Yet the consequences of the altogether rudderless inquiry that the statute calls for are profound. If a court determines that the "risk" of "physical force" posed by the "ordinary case" of California burglary is sufficiently "substantial," then *every defendant* with a California burglary conviction

will be regarded as having been convicted of a "crime of violence"—even if a particular defendant's real-world conduct bears no resemblance to the judicially imagined "ordinary case," and gave rise to no meaningful risk that physical force might actually be used.[2]

The § 16 residual clause, then, suffers from the same two infirmities that left the ACCA's residual clause unconstitutionally vague: It ties the assessment of an uncertain amount of risk to a judicially imagined "ordinary case" of a crime. In concluding that the § 16 residual clause is unconstitutionally vague, the Court of Appeals did nothing more than faithfully apply *Johnson*. The question presented therefore does not merit this Court's review.

II. The Government's Efforts To Distinguish *Johnson* Fail, And Only Highlight That An Immigration Case Is A Poor Vehicle To Review The Constitutionality Of The § 16 Residual Clause, A Criminal Statute.

The government's principal argument for certiorari emphasizes that, in this case, the § 16 residual clause operates in the context of an immigration proceeding. The government contends the Court of Appeals erred when it "applied the

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[2] In contrast, the categorical approach as applied in all other contexts avoids this potential unfairness because it looks not to the hypothetical "ordinary case," but rather to "the minimum conduct criminalized by the state statute." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

vagueness standard appropriate for criminal laws" to the § 16 residual clause as it arose in that context, rather than applying some other vagueness standard, whose contours the government does not specify except to say that it is "less exacting" than the standard used in *Johnson*. Pet. 11-12. Only in the alternative does the government suggest that two textual distinctions between the § 16 residual clause and the ACCA's residual clause dictate a different outcome here, even if the same vagueness standard applies. Both arguments are flawed, and neither merits this Court's review.

A. The government's threshold question presented regarding the void-for-vagueness standard is not certworthy, is foreclosed by precedent, and could stand in the way of this Court's consideration of the *Johnson* question presented.

1. The government first argues that *Johnson* does not control here because its void-for-vagueness analysis of a criminal statute does not apply to an immigration case. Pet. 11-16. But 65 years ago, this Court held the opposite. In *Jordan v. De George*, this Court considered an early 20th-century precursor to the INA's provisions regarding convictions that may lead to deportation. 341 U.S. at 225. It held that, "in view of the grave nature of deportation," which it likened to "banishment or exile," the Court must "test this [immigration] statute under the *established criteria* of the 'void for vagueness' doctrine." *Id.* at 231 (emphasis added). The government's contention that "*Jordan* did not have occasion to decide whether the

same vagueness standards" apply to deportation statutes is flatly wrong. Pet. 14.

Indeed, as courts have consistently recognized, *Jordan* makes "clear that an alien may bring a vagueness challenge to a deportation statute." *Beslic v. INS*, 265 F.3d 568, 571 (7th Cir. 2001); *see also Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013). The government identifies no case in which this Court has receded from *Jordan*. Nor does the government identify any case in which lower courts have upheld deportation statutes under some framework other than the "established criteria of the 'void for vagueness' doctrine," or any case showing a split in authority whatsoever on the issue.

This Court, moreover, has repeatedly reaffirmed the premises underpinning its decision in *Jordan*. This Court has consistently recognized the "sever[ity]" of deportation as a form of "banishment," particularly for permanent residents like Dimaya. *Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012). And this Court has identified deportation as "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants" in criminal proceedings. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (citation omitted). Applying the "established" void-for-vagueness framework in the immigration context, in light of "the grave nature of deportation," therefore remains fully valid today. *Jordan*, 341 U.S. at 231. The government fails to offer any compelling reason why this Court should consider upending that precedent.

2. Even if this Court wished to reconsider *Jordan* and entertain the government's argument that deportation statutes are subject to a different vagueness standard than criminal statutes, this case presents a poor vehicle for doing so, because § 16 *is* a criminal statute. It is part of Title 18, the criminal code, and merely referenced by the INA.

Indeed, even as it is incorporated into the INA, § 16 has criminal applications: A noncitizen convicted under 8 U.S.C. § 1326(a) of illegally reentering the country may receive a substantially higher sentence if he was previously removed following "a conviction for an aggravated felony"—the INA term whose definition incorporates § 16. 8 U.S.C. § 1326(b)(2); *see id.* § 1101(a)(43)(F). It was in precisely that immigration-crime sentencing context that the Seventh Circuit held § 16's residual clause void for vagueness in *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015). "Because [this Court] must interpret the statute consistently" in "both [its] criminal and noncriminal applications," principles governing the criminal context, including the void-for-vagueness inquiry, must govern § 16 even "in the deportation context." *Leocal*, 543 U.S. at 11 n.8 (applying the rule of lenity to § 16 even as applied in the immigration context); *see also Clark v. Martinez*, 543 U.S. 371, 378 (2005) (giving the same statutory provision a different meaning in different applications "would be to invent a statute rather than interpret one").

Accordingly, because this case involves a criminal statute through-and-through, it offers no opportunity to address the government's argument that a lesser

vagueness standard applies to *immigration* statutes. *Jordan*, in contrast, addressed a pure immigration provision of the immigration statutes themselves. *See* 341 U.S. at 225. Any case revisiting *Jordan* would properly do the same.

3. By the same token, the government's interjection of the *Jordan* question makes this immigration case a poor vehicle to decide whether § 16's residual clause is unconstitutionally vague in its *criminal* applications under *Johnson*. The government identifies § 16's function as a criminal provision in arguing that the *Johnson* question presented is an important one: "Section 16 ... applies to numerous provisions of Title 18, including provisions covering such areas as money laundering, racketeering, domestic violence, and crimes against children," and thus the Seventh and Ninth Circuits' decisions, which invalidated the § 16 residual clause, could "create[] a cloud of uncertainty over the lawfulness of criminal prosecutions and sentencing enhancements under those provisions." Pet. 29-30. But if the government were correct that a diluted void-for-vagueness standard should apply when § 16 operates in the context of an immigration proceeding, this Court's decision would do nothing to dissipate the cloud of uncertainty in criminal cases the government alleges. A reversal would establish only that the § 16 residual clause is not unconstitutionally vague when it operates in the immigration context. It would leave open the question whether the clause is nevertheless unconstitutional under *Johnson* when it operates in its primary function as a criminal law, in the context of a criminal prosecution or sentencing proceeding.

B. The minor textual differences between the ACCA's residual clause and the § 16 residual clause are immaterial and if anything compound the latter's vagueness.

As an alternative argument, the government seizes on two textual differences between the ACCA's residual clause and the § 16 residual clause. The government argues that these give the § 16 residual clause precision that the ACCA's residual clause lacked. But to the extent these purported distinctions are material at all, they only compound the § 16 residual clause's vagueness. Neither provides any basis for distinguishing this case from *Johnson*.

1. The government first observes that § 16 refers to the "risk that physical force ... may be used in the course of committing the offense," whereas the ACCA referred to the "risk of physical injury to another." Pet. 17-18. The government suggests that, because it refers to "injury," the ACCA's residual clause "requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out" wholly apart from "the elements of the crime." Pet. 18. Accordingly, the government contends, § 16 is less vague because it requires assessing the risk of a harm *during* the commission of an offense rather than *after*. Pet. 18.

But the same is true of the § 16 residual clause. As the government notes, *Johnson* observed that "[t]he act of ... breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because

... the burglar might confront a resident in the home *after* breaking and entering." 135 S. Ct. at 2557. So too with the "risk that physical force against the person or property of another may be used in the course of committing" a burglary: The risk largely arises *after* the entry has already occurred—especially under a statute like California's, which requires no unlawful entry at all, much less "breaking." Of necessity, the "elements of the crime" themselves will not entail any use of force, or else the offense would fit under § 16(a)'s elements clause and there would be no need to resort to the residual clause at all. As with the ACCA's residual clause, § 16's residual clause requires courts to look to a speculative harm that is "remote from the criminal act" itself. *Johnson*, 135 S. Ct. at 2559.

Furthermore, "physical force" is hardly a more precisely defined term than "physical injury," such that imagining how much the "ordinary case" involves would be any easier. On the contrary, this Court has repeatedly grappled with the meaning of "physical force," as used in other statutory provisions. Sometimes, "[p]hysical force" actually requires "violent force— ... force capable of causing physical pain or injury to another person," which can be called a "substantial degree of force." *Johnson*, 559 U.S. at 140 (addressing 18 U.S.C. § 924(e)(2)(B)(i)). In other contexts, reference to "the use or attempted use of physical force" has its common law meaning and is "satisfied by even the slightest offensive touching." *United States v. Castleman*, 134 S. Ct. 1405, 1409-10 (2014) (addressing 18 U.S.C. § 922(g)(9)).

This Court has not addressed whether § 16's reference to "physical force" requires violent force, any offensive touching, or something else. The Courts of Appeals, however, have generally assumed that it requires violent force, as defined in the 2010 *Johnson* decision. *See Castleman*, 134 S. Ct. at 1411 n.4; *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015); *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003). If that is correct, then the § 16 residual clause adds another layer of imprecision to the two this Court deemed fatal to the ACCA's residual clause in *Johnson*. Courts would not only have to determine whether the "risk" of "physical force" posed by an imaginary "ordinary case" is sufficiently "substantial"; they would also have to determine whether that imagined physical force would be sufficiently "substantial" to constitute "violent force." Far from making the § 16 residual clause clearer, then, the clause's addition of a perplexing "physical force" standard to the vague "ordinary case" approach makes its application even more speculative than application of the ACCA residual clause's "physical injury" standard to that approach.

Moreover, what it means for "physical force" to "be used" is also not always clear in actual cases, let alone the hypothetical cases the residual clauses require dreaming up. The government notes that § 16's reference to "a substantial risk that physical force ... *will be used*" means the statute will not sweep up "the risk of injuries resulting from 'accidental or negligent conduct,'" and that the § 16 residual clause is consequently "narrower ... than the standard set

forth in the ACCA's residual clause." Pet. 19 (quoting *Leocal*, 543 U.S. at 11). But whether "use" extends to reckless (rather than intentional) conduct is a question this Court has left open three times, even as it has divided the circuits. *See Voisine v. United States*, 136 S. Ct. 2272, 2280 n.4 (2016); *Castleman*, 134 S. Ct. at 1414 n.8; *Leocal*, 543 U.S. at 13. *Compare United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014) (recklessly causing physical injury to individual in violation of a protection order comes within 18 U.S.C. § 16(b)), *and Aguilar v. Att'y Gen.*, 663 F.3d 692, 696 (3d Cir. 2011) (mens rea of recklessness suffices for an offense to be a "crime of violence" under the § 16 residual clause), *with United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (the definition is limited to intentional conduct), *Jimenez-Gonzalez*, 548 F.3d at 560 (same), *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) (same), and *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (same). If the Third and Fifth Circuits' position ultimately prevails, then the standard established by the clause will barely be "narrower ... than the standard set forth in the ACCA's residual clause," as the government contends. Pet. 19. Rather, both would ultimately hinge on the risk that conduct—including non-intentional conduct—will cause a harm.

2. The second textual distinction between the residual clauses the government identifies likewise only compounds the § 16 residual clause's vagueness. The government points out that the ACCA's residual clause directly followed a reference to four specific crimes, which vary "in the degree of risk they pose" and thus added to that provision's indeterminacy.

Pet. 20; *see* 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony" to be a crime that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"). By contrast, the § 16 residual clause is not preceded by any specific offenses.

But it is hard to see why a definition that has *no* such parameters is *less* amorphous than a definition that at least has some guideposts, even if they are "confusing" ones. *Johnson*, 135 S. Ct. at 2561. The government has put it best: "The reference to the enumerated offenses ... far from pointing towards vagueness, ma[de] the [ACCA] residual clause more concrete in application than other criminal statutes tied to risk." Supplemental Brief of the United States at 26, *Johnson v. United States*, 135 S. Ct. 2551 (2015). Yet even those references were not enough to save the ACCA's residual clause under a vagueness analysis.

In any event, *Johnson*'s holding did not hinge on the ACCA residual clause's four example offenses. The *Johnson* Court referred to them merely in the course of responding to an argument made by the government and the dissent. *Johnson*, 135 S. Ct. at 2561. The Court emphasized that "[m]ore important[]" to its holding was the problematic "application of the 'serious potential risk' standard to an idealized ordinary case of the crime"—the combination of features that § 16's residual clause shares. *Id.* at 2561 (second emphasis original).

This Court reiterated the point last Term in *Welch v. United States*, stressing that "[t]he vagueness of the [ACCA] residual clause rest[ed] in large part on its operation under the categorical approach.... The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. at 1262. In explicating *Johnson*'s holding, the *Welch* Court did not even mention the four example offenses that the government now contends were essential to the outcome in *Johnson*.

C. Like the ACCA provision in *Johnson*, the § 16 residual clause has generated substantial confusion.

The government next contends that the Court of Appeals "erred in disregarding" the absence of a lengthy series of decisions of this Court addressing the § 16 residual clause, and that this lack of case law indicates that the § 16 residual clause cannot be unconstitutionally vague. Pet. 22. But *Johnson* said only that "the failure of persistent efforts ... to establish a standard can provide *evidence* of vagueness" and that its "repeated attempts and repeated failures to craft a principled and objective standard out of the [ACCA] residual clause *confirm* its hopeless indeterminacy." 135 S. Ct. at 2558 (internal quotation marks, citations, and alterations omitted) (emphasis added). This Court did not hold that there is a minimum number of residual clause "beasties" that must be added "to [this Court's] bestiary of ... residual-clause standards" before a

residual clause will be struck down. *Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of certiorari). Nor did this Court suggest that inferences about the constitutionality of statutory enactments may be made on the basis of this Court's exercise of its "discretionary authority to manage [its] certiorari docket." *Lawrence v. Chater*, 516 U.S. 163, 175 (1996) (Stevens, J., concurring).

In any event, the § 16 residual clause has proven at least as perplexing as its ACCA counterpart. Circuit splits abound over whether particular offenses qualify under the provision. In the Fifth Circuit, unauthorized use of a motor vehicle is a crime of violence under the residual clause. *De La Paz Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) (per curiam), *cert. denied*, 552 U.S. 811 (2007). In the Tenth Circuit, it is not. *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007). In the Fifth Circuit, auto burglary qualifies under the residual clause. *Escudero-Arciniega v. Holder*, 702 F.3d 781, 784-85 (5th Cir. 2012). In the Seventh and Ninth Circuits, it does not. *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 (7th Cir. 2000); *Sareang Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000). And so on. Thus, the leading immigration law treatise contains nine pages of small typeface text detailing the idiosyncratic and often conflicting conclusions that various courts have reached in applying § 16 to a range of state offenses. Ira J. *Kurzban, Immigration Law Sourcebook* 261-69 (15th ed. 2016).

In short, the § 16 residual clause is, if anything, even more imprecise than the ACCA's residual clause,

and neither the minor textual differences between the ACCA and § 16 nor this Court's decision to hear fewer § 16 cases provides a plausible basis for distinguishing this case from *Johnson*.

III. This Court's Review Would Be Premature Because The Courts Of Appeals Have Only Just Begun To Evaluate Other Provisions Under *Johnson*.

Certiorari is also unwarranted because the percolation actively under way in the Courts of Appeals should be permitted to continue, at least until an appropriate criminal case presents the question of the § 16 residual clause's constitutionality.

At the time the government filed its petition, there was no circuit split. The government cited (Pet. 26-27) the Sixth Circuit's decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), but that case upheld the constitutionality of a *different* statute, 18 U.S.C. § 924(c)(3)(B). Although § 924(c)(3)(B)'s terms are the same as those of the § 16 residual clause, that statute operates in a distinctly different context. And indeed, not even a month later, the Sixth Circuit distinguished *Taylor* and joined the Seventh Circuit and the Ninth Circuit (in the decision below) in holding the § 16 residual clause unconstitutionally vague under *Johnson*. *Shuti v. Lynch*, No. 15-3835, 2016 WL 3632539, at *1 (6th Cir. July 7, 2016).

Shuti observed that § 924(c)(3)(B) supplies the definition of a "crime of violence" for a federal criminal statute that imposes heightened penalties on "any

person who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm." 18 U.S.C. § 924(c)(1)(A). Distinguishing the *Taylor* decision the petition cites, the Sixth Circuit explained that "[u]nlike the ACCA and [the § 16 residual clause as it operates in an immigration proceeding], which require a categorical approach to stale predicate convictions" under an abstract, "ordinary case" inquiry, § 924(c)(3)(B) outlines "an element of the crime," which "requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding," based on the case-specific facts before the court. *Shuti*, 2016 WL 3632539, at *8. That distinction, the Sixth Circuit concluded, "makes all the difference" for vagueness purposes. *Id.*

In contrast to § 924(c)(3)(B), "the wide-ranging inquiry required by" the ACCA's residual clause and the § 16 residual clause is "one and the same, and therefore" the § 16 residual clause "is likewise unconstitutionally vague." *Id.* at *1. Like the Ninth Circuit, the Sixth Circuit recognized that the § 16 residual clause "mandates a categorical mode of analysis that deals with 'an imaginary condition other than the facts,'" and is thus indistinguishable from the ACCA's residual clause and invalid under *Johnson*. *Shuti*, 2016 WL 3632539, at *7 (quoting *Johnson*, 135 S. Ct. at 2561). To the extent dicta in *Taylor* might support the government's alternative interpretation of *Johnson*, moreover, *Shuti* noted that *Taylor* was decided before this Court decided *Welch*, which made clear that "the ACCA's vagueness 'rests in large part on its operation under the categorical

approach.'" *Shuti*, 2016 WL 3632539, at *8 (quoting *Welch*, 136 S. Ct. at 1262). *Shuti* also rejected the government's efforts to distinguish the two statutes based on their minor textual differences or the comparative lack of decisions from this Court concerning the § 16 residual clause. *Shuti*, 2016 WL 3632539, at *7-8. And *Shuti* dismissed the government's contention that the established vagueness framework does not apply to § 16 when it operates in an immigration proceeding. *Shuti*, 2016 WL 3632539, at *4-5.

In the few weeks that have followed, two other circuits have weighed in on § 924(c)(3)(B), the statute not at issue in this case, agreeing with the Sixth Circuit in *Taylor*. *See United States v. Prickett*, No. 15-3486, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) (distinguishing *Johnson* on the ground that "§ 924(c)(3)(B)'s residual clause operates on 'real-world facts,' not '"an idealized ordinary case of the crime"'); *see also United States v. Hill*, No. 14-3872, 2016 WL 4120667, at *10-12 (2d Cir. Aug. 3, 2016) (dicta in a § 924(c)(3)(B) case agreeing with *Taylor* that § 924(c)(3)(B) is not unconstitutionally vague under *Johnson*). And in two cases involving § 924(c)(3)(B), the Ninth Circuit is currently considering whether to adopt this unanimous view that § 924(c)(3)(B) is constitutional by distinguishing the ruling in this case just as the Sixth Circuit distinguished *Taylor* in *Shuti*—which would leave those two circuits in alignment on both statutes. *See United States v. Begay*, No. 14-10080 (9th Cir.); *United States v. Gaytan*, Nos. 14-10167, -10226 (9th Cir.). Meanwhile, the Second Circuit will soon hear argument in a case concerning the § 16 residual

clause, and might distinguish its dicta in *Hill* regarding § 924(c)(3)(B) in the same way the Sixth Circuit did in *Shuti*. *See Ya Yi Zeng v. Lynch*, 15-709 (2d Cir.) (oral argument scheduled for Sept. 1, 2016).

Most recently, the Fifth Circuit sitting en banc held that the § 16 residual clause is not unconstitutional under *Johnson*, declining to follow the only other courts to have considered the question, and reversing its earlier decision that agreed with the decision below. *United States v. Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127 at 1 n.1, *4-5 (5th Cir. Aug. 5, 2016) (en banc), *rev'g United States v. Gonzalez-Longoria*, 813 F.3d 225, 235 (5th Cir. 2016). For the reasons aptly stated by Judge Jolly in dissent and outlined above, the Fifth Circuit majority erred: The two distinctions it drew between the ACCA and § 16 residual clauses do "exist," but "both 'are, ultimately, distinctions without a difference.'" *Id.* at 24 (Jolly, J., dissenting) (quoting *Shuti*, 2016 WL 3632539, at *7).

In light of the Fifth Circuit's very recent departure from both *Johnson* and the views of most circuits, a case upholding the § 16 residual clause may eventually warrant this Court's review. A criminal case such as *Gonzalez-Longoria* would not require this Court to address the government's threshold question regarding the applicable vagueness standard before being able to address the constitutionality of the § 16 residual clause under *Johnson*. For now, however, the proper course is to allow the Courts of Appeals to continue examining the relationship between *Johnson*, *Welch*, the § 16 residual clause, and § 924(c)(3)(B).

IV. The Government Overstates The Effect Of The Court Of Appeals' Decision.

Although it is a matter of consequence whenever a court declares an Act of Congress unconstitutional, the Court of Appeals' constitutional holding flowed from a direct application of this Court's recent decision in *Johnson* striking down a materially identical statute. Any presumption in favor of reviewing decisions invalidating Acts of Congress therefore does not apply.[3]

Moreover, the government significantly overstates the impact of the § 16 residual clause's invalidity. While it is true that "an alien's conviction for an 'aggravated felony' triggers numerous legal consequences," Pet. 27, a conviction for an "aggravated felony" is only one of the numerous ways in which a criminal conviction may render an immigrant deportable. Here, for instance, the question remains open on remand to the BIA whether Dimaya is still removable for having been convicted of

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[3] Indeed, when a Court of Appeals strikes down a statute that is substantially related to a statute this Court has recently invalidated, the government often will not seek certiorari in the first place. *See, e.g.*, *United States v. Swisher*, 811 F.3d 299, 303-04 (9th Cir. 2016) (en banc) (declaring unconstitutional 18 U.S.C. § 704(a), which criminalizes the unauthorized *wearing* of military medals, under *United States v. Alvarez*, 132 S. Ct. 2537 (2012), which invalidated a statute that prohibits anyone from *falsely stating* he was awarded military medals); *United States v. Swisher*, No. 15A1009 (U.S. Mar. 31, 2016) (extending the time for the government to seek certiorari before no petition was filed).

two "crime[s] involving moral turpitude" 8 U.S.C. § 1227(a)(2)(A)(ii).[4]

Even where an immigrant's removability does hinge on a conviction for an "aggravated felony," § 16 is relevant to only one of the 21 INA subsections that define an "aggravated felony." The Court of Appeals' decision does not undermine any of the other 20 ways in which the government can show a conviction for an "aggravated felony"—including, among other things, a conviction for "murder, rape, or sexual abuse of a minor," "illicit trafficking in a controlled substance," "illicit trafficking in firearms or destructive devices," or an offense "relating to the demand for or receipt of ransom." 8 U.S.C. § 1101(a)(43)(A), (B), (C), (H). One of the many subsections that defines an "aggravated felony," for instance, refers to "a theft offense ... or burglary offense for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(G). Here, the government is forced to resort to the "crime of violence" classification only because *Descamps* forecloses any argument that a conviction under California's burglary statute constitutes a conviction for generic burglary. That end-run around *Descamps* does not prove the urgency of preserving the § 16 residual clause, but rather highlights its indeterminacy. *See supra* § II.B.

The Court of Appeals' decision, moreover, casts no doubt on the constitutionality of the "elements clause" of the crime of violence provision, set forth in 18

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[4] *See, e.g., In re Louissaint*, 24 I. & N. Dec. 754 (BIA 2009) (determining that a Florida conviction for burglary of an occupied building constitutes a crime involving moral turpitude).

U.S.C. § 16(a), which requires examination of actual elements of actual offenses, rather than hypothetical ordinary cases of non-element conduct. And the § 16(a) elements test is broader than the analogous elements test set forth in the ACCA: Whereas the latter encompasses offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," the former refers to the "use of physical force against the person *or property* of another." The breadth of § 16(a) underscores that in a great many cases the government will be able to establish that a given offense constitutes a "crime of violence" via the elements test, wholly apart from any resort to the § 16 residual clause. The Court of Appeals' decision will have no impact on those cases at all.

The § 16 residual clause operates only in marginal circumstances. It sweeps into the definition of a "crime of violence" offenses that do not require the "use, attempted use, or threatened use of physical force against the person or property of another." And it does so on the basis of pure judicial speculation about the risk that physical force might be used in the course of committing a judicially imagined offense. This Court in *Johnson* determined that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." 135 S. Ct. at 2560. The court below likewise determined that the government could not invoke so shapeless a provision to banish Dimaya from the country that has been his home for well over two decades, since the age of 13. The Court of Appeals correctly applied this Court's

recent precedent, and its ruling does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

A. The Ninth Circuit's holding is incorrect 2
B. The Ninth Circuit's decision warrants this Court's review 8
C. This case is a suitable vehicle to resolve the question presented 11

TABLE OF AUTHORITIES

Cases:

Johnson v. *United States*, 135 S. Ct. 2551 (2015) 3, 5, 6, 7
Jordan v. *De George*, 341 U.S. 223 (1951) 3
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 5
Marcello v. *Bonds*, 349 U.S. 302 (1955) 3
Shuti v. *Lynch*, No. 15-3835, 2016 WL 3632539 (6th Cir. July 7, 2016) 2, 9
United States v. *Acosta*, 470 F.3d 132 (2d Cir. 2006), cert. denied, 552 U.S. 1037 (2007) 10
United States v. *Amparo*, 68 F.3d 1222 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996) 10
United States v. *Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009) 7
United States v. *Fuertes*, 805 F.3d 485 (4th Cir. 2015), cert. denied, 136 S. Ct. 1220 (2016) 10
United States v. *Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127 (5th Cir. Aug. 5, 2016) 1, 5, 6, 7, 9
United States v. *Hill*, No. 14-3872-cr, 2016 WL 4120667 (2d Cir. Aug. 3, 2016) 2, 5, 6, 7, 9
United States v. *Kennedy*, 133 F.3d 53 (D.C. Cir. 1998) 10
United States v. *Moore*, 38 F.3d 977 (8th Cir. 1994) 10
United States v. *Prickett*, No. 15-3486, 2016 WL 4010515 (8th Cir. July 27, 2016) 10

Cases—Continued: Page

United States v. *Rafidi*, No. 15-4095, 2016 WL 3670273 (6th Cir. July 11, 2016) 10
United States v. *Serafin*, 562 F.3d 1105 (10th Cir. 2009) 10
United States v. *Taylor*, 814 F.3d 340 (6th Cir. 2016) ... 9, 10
United States v. *Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015) 2
United States v. *Williams*, 343 F.3d 423 (5th Cir.), cert. denied, 540 U.S. 1093 (2003) 10
Welch v. *United States*, 136 S. Ct. 1257 (2016) 6

Statutes:

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii) 3
Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(f) 1
18 U.S.C. 16(a) 5
18 U.S.C. 16(b) ..... *passim*
18 U.S.C. 924(c)(3)(B) ..... *passim*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the decision below, a divided panel of the Ninth Circuit held that 18 U.S.C. 16(b), an important provision of the federal criminal code, is unconstitutional on its face, at least as incorporated through the definition of "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(F), for application in immigration proceedings. That holding warrants this Court's review. The INA's definition of aggravated felony applies to numerous provisions of the INA, and the Ninth Circuit's analysis provided no basis to distinguish Section 16(b)'s criminal applications. Moreover, after the petition for a writ of certiorari was filed, the en banc Fifth Circuit held that Section 16(b) "is not unconstitutionally vague," *United States* v. *Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127, at *1-*2 (Aug. 5, 2016), and a Second Circuit panel rejected a vagueness challenge to the materially identical definition of "crime of violence" in 18 U.S.C.

924(c)(3)(B), see *United States* v. *Hill*, No. 14-3872-cr, 2016 WL 4120667, at *1, *7-*12 (Aug. 3, 2016). Those decisions conflict with the decision below, the decision of the Seventh Circuit in *United States* v. *Vivas-Ceja*, 808 F.3d 719 (2015), and an intervening decision of the Sixth Circuit, *Shuti* v. *Lynch*, No. 15-3835, 2016 WL 3632539 (July 7, 2016).

Respondent argues (Br. in Opp. 19) that this case is an unsuitable vehicle for resolving the question of Section 16(b)'s constitutionality because the government contends at the threshold that civil immigration laws are not subject to the same vagueness standard as criminal laws. Respondent is correct that, if the Court agrees with the government's position on that threshold question, the Court could uphold Section 16(b) in its immigration applications without resolving whether Section 16(b) is unconstitutionally vague in its criminal applications. But the mirror-image risk would exist if this Court first granted review in a criminal case: If the Court held Section 16(b) unconstitutional in criminal applications, it likely would not resolve the question whether the statute is nevertheless valid in immigration applications. And the Court can resolve the constitutionality of Section 16(b) in both settings by holding in this case that it is constitutional under the standard applicable to criminal laws. Respondent's vehicle objection therefore is not a persuasive ground to deny review.

A. The Ninth Circuit's Holding Is Incorrect

Respondent contends (Br. in Opp. 31) that the question presented does not warrant this Court's review because the Ninth Circuit's holding that Section 16(b) is unconstitutionally vague "flowed from a direct application of this Court's recent decision in

Johnson [v. *United States*, 135 S. Ct. 2551 (2015)]," which held unconstitutional the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii). But as 11 judges of the Fifth Circuit have concluded, joining dissenting Judge Callahan in this case and a unanimous panel of the Second Circuit, concerning the materially identical text in 18 U.S.C. 924(c)(3)(B), that argument is incorrect.

1. At the threshold, the same vagueness standard applicable to criminal laws does not apply to immigration laws with civil consequences. See Pet. 11-16. Respondent erroneously contends (Br. in Opp. 16-19) that this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), forecloses that argument. As explained in the petition, however, that view overreads *Jordan*—a case in which a vagueness argument was "not raised by the parties nor argued before th[e] Court," *id.* at 229. It is true that in *Jordan* the Court elected to "test [the deportation] statute [at issue in that case] under the established criteria of the 'void for vagueness' doctrine" in light of an argument raised by the dissent. *Id.* at 231. But the issue was not briefed, and the Court had no occasion to decide whether a lesser standard should apply to civil immigration laws because the Court concluded that the statute satisfied the criminal-law standard. See *id.* at 231-232.

Respondent, moreover, does not address the fact that the two constitutional concerns undergirding the vagueness doctrine in criminal cases—ensuring fair notice and avoiding arbitrary enforcement—have far less relevance for civil immigration laws. See Pet. 12-13. Unlike criminal laws, deportation laws can apply retroactively, see *Marcello* v. *Bonds*, 349 U.S. 302, 314

(1955), substantially if not entirely eroding any fair-notice expectation. And immigration laws can be given single, authoritative interpretations by the Executive Branch in immigration proceedings, through the Attorney General and the Board of Immigration Appeals, promoting consistent enforcement across cases.

Respondent contends (Br. in Opp. 18-19) that even if a different vagueness standard applies to civil immigration statutes, such a standard would not apply here because the INA's definition of "aggravated felony" is incorporated into certain criminal provisions (as the petition notes, see Pet. 16 n.2). That contention is mistaken. The fact that language appearing in one statute is made applicable under another statute by cross-reference does not mean that the constitutionality of the language must be reviewed under the same standard in the different context of the latter statute, where the same individual rights and interests are not implicated.

2. With respect to the question whether Section 16(b) satisfies the criminal-law vagueness standard, respondent erroneously contends (Br. in Opp. 20) that Section 16(b) and the ACCA's residual clause have only "minor textual differences." As the 11-4 majority of the en banc Fifth Circuit recently held, the language of Section 16(b) is materially different from the language of the ACCA's residual clause.

a. The petition explains (at 17-18) that a critical component of this Court's holding in *Johnson* was that the ACCA's residual clause's "ordinary case" analysis "goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" and requires a court to determine whether a "risk of inju-

ry arises because the [offender] might engage in violence after" completing the offense, *Johnson*, 135 S. Ct. at 2557. In contrast, the plain text of Section 16(b) requires a substantial risk that "physical force" will be used "*in the course of committing the offense*." 18 U.S.C. 16(b) (emphasis added); see *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004). As the en banc Fifth Circuit explained, Section 16(b) is "notably more narrow" and "predictively more sound" than the ACCA's residual clause because it "does not allow courts to consider conduct or events occurring after the crime is complete." *Gonzalez-Longoria*, 2016 WL 4169127, at *3-*4; accord *Hill*, 2016 WL 4120667, at *10.

Respondent nevertheless asserts (Br. in Opp. 20-21) that Section 16(b) also requires consideration of conduct that takes place after completion of the offense. His argument overlooks the key phrase "in the course of committing the offense." And respondent is incorrect that if the risk inquiry were limited to risks arising during the commission of the offense, Section 16(b) would be redundant with Section 16(a). Section 16(a) encompasses offenses that have as an *element* the use of physical force against the person or property of another. Section 16(b), in contrast, encompasses offenses that inherently entail a substantial *risk* of the use of force against person or property.

Respondent's other efforts to reconcile the decision below with the text of Section 16(b) are equally unavailing. Respondent observes (Br. in Opp. 21-22), for example, that this Court has construed the term "physical force" in different ways depending on the statutory context. But far from demonstrating vagueness, that observation confirms that the phrase is amenable to interpretation: In none of those prece-

dents did the Court conclude that the phrase is impermissibly vague.

Respondent also suggests (Br. in Opp. 3, 25) that this Court's summary description of *Johnson*'s holding in *Welch* v. *United States*, 136 S. Ct. 1257, 1262 (2016), establishes that *Johnson* turned entirely on the fact that the ACCA's residual clause requires an "ordinary case" analysis. But *Welch*, which held that *Johnson* applies retroactively in the collateral review of ACCA sentences, did not purport to alter *Johnson*'s statute-specific vagueness analysis, which expressly rested on multiple features of the statute and the multiple failed efforts to interpret it.

b. The petition also explains (at 19-21) that *Johnson* concluded that the ACCA's residual clause gave rise to uncertainty about how much risk was necessary to satisfy the statute because it linked the risk level to a set of dissimilar exemplar offenses. That feature is absent from Section 16(b) as well. Indeed, the Second Circuit recently concluded that the "most obvious[]" distinction between the Section 16(b) definition and that of the ACCA's residual clause is that the former "contains no mystifying list of offenses and no indeterminate 'otherwise' phraseology." *Hill*, 2016 WL 4120667, at *9 (discussing materially identical definition at 18 U.S.C. 924(c)(3)(B)); accord *Gonzalez-Longoria*, 2016 WL 4169127, at *4 (discussing Section 16(b)).

Echoing the Ninth Circuit majority, respondent asserts (Br. in Opp. 24) that the lack of "a confusing list of examples," *Johnson*, 135 S. Ct. at 2561, makes Section 16(b) *more* vague. That contention cannot be reconciled with *Johnson*'s vagueness analysis. This Court explicitly reasoned that the list of exemplar

crimes magnified the indeterminacy of the ACCA's residual clause. See 135 S. Ct. at 2558, 2561.

c. Finally, the petition explains (at 22-25) that precisely because of the more targeted language of Section 16(b), that statute has not generated anywhere close to the degree of interpretive difficulty in this Court and among lower courts as the ACCA's residual clause—a driving factor in *Johnson*, see 135 S. Ct. at 2558-2560, 2562-2563. The Second and Fifth Circuits have now confirmed that the particular language of Section 16(b) "has no history of 'repeated attempts and repeated failures' on the part of courts 'to craft a principled and objective standard' out of its terms." *Hill*, 2016 WL 4120667, at *10 (quoting *Johnson*, 135 S. Ct. at 2558); see *Gonzalez-Longoria*, 2016 WL 4169127, at *6.

Respondent strives to portray Section 16(b) as generating ACCA-like interpretive confusion (Br. in Opp. 25-27), identifying two purported conflicts of authority, one over the offense of unauthorized use of a motor vehicle and the other over the offense of burglary of a vehicle. The first of those conflicts, however, does not exist; respondent overlooks that the Fifth Circuit overruled its pre-*Leocal* precedent in 2009 and held that unauthorized use of a motor vehicle is not a crime of violence under Section 16(b). See *United States* v. *Armendariz-Moreno*, 571 F.3d 490, 491 (per curiam). While respondent asserts that there are other conflicts as well, he does not specify what they are and their nature and significance. And in any event, the existence of some differences over particular applications of a statute that has been in existence for 30 years, and that was intended to cover a wide range of dangerous criminal offenses under federal

and state law, would fall far short of establishing that the statute is unworkably opaque.

B. The Ninth Circuit's Decision Warrants This Court's Review

1. A divided Ninth Circuit panel has held an important provision of an Act of Congress unconstitutional, which alone justifies review by this Court. Even if that decision were somehow limited to the immigration context, the INA's definition of "aggravated felony" has numerous applications throughout federal immigration law. See Pet. 27-29. And the Ninth Circuit has the largest immigration docket in the country.

Respondent attempts (Br. in Opp. 31-33) to downplay the significance of the Ninth Circuit's holding on the ground that an alien in the Ninth Circuit who would have been removable and ineligible for discretionary relief because he was convicted of a Section 16(b) offense may nevertheless ultimately be removed on some other ground. Although that will be true in some cases, the Ninth Circuit's divided decision unquestionably shields a category of aliens from immigration-law consequences that Congress plainly intended for aliens with convictions for violent crimes, on the ground that Congress failed to enact a sufficiently determinate statute. Such an important holding should be reviewed by this Court.

2. Respondent also does not deny that the courts of appeals are divided on the constitutionality of Section 16(b) and that the conflict is unlikely to be resolved without this Court's intervention. As noted above, after the petition was filed, the en banc Fifth Circuit held that Section 16(b), as applied through the INA's definition of aggravated felony (as itself

incorporated into a Sentencing Guideline), is not void for vagueness. See *Gonzalez-Longoria*, 2016 WL 4169127, at *1-*2. In addition, a Second Circuit panel recently upheld against a vagueness challenge the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which (unlike the ACCA's residual clause) is materially identical to Section 16(b). See *Hill*, 2016 WL 4120667, at *1, *7-*12. The Second Circuit found the Ninth Circuit's decision in this case "unpersuasive" because the decision "underestimates—or misunderstands—the significance of the list of enumerated offenses in the ACCA's residual clause to the decision in *Johnson*," "ignore[s] or minimize[s] the other textual distinctions between the residual clause and the language of § 16(b)," and "dismisses the significance of the Supreme Court's fraught precedent interpreting the ACCA's residual clause." *Id.* at *10-*11.

The petition argues (at 26-27) that the decision below also conflicts with the Sixth Circuit's decision in *United States* v. *Taylor*, 814 F.3d 340 (2016), which, like *Hill*, rejected a vagueness challenge to the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B). After the petition was filed, however, a different panel of the Sixth Circuit held that Section 16(b), as applied through the INA's definition of aggravated felony, is unconstitutionally vague. See *Shuti*, 2016 WL 3632539, at *9. *Shuti* distinguished *Taylor* by reasoning that Section 924(c)(3)(B) does not require courts to use the "categorical approach" to determine whether an offense presents the requisite level of risk, but rather requires a jury to determine whether a defendant's particular conduct presented sufficient risk. 2016 WL 3632539, at *8. That reasoning, however,

conflicts with the near-unanimous view of other circuits that Section 924(c)(3)(B), like Section 16(b), requires a categorical approach to determining whether a particular offense meets the definition of "crime of violence."[1] Indeed, *Taylor* itself said that Section 924(c)(3)(B) "requires the application of a categorical approach," 814 F.3d at 378, and four days after *Shuti*, a different Sixth Circuit panel reaffirmed in a precedential decision that the Sixth Circuit "use[s] a 'categorical approach' to determine whether an offense constitutes a 'crime of violence' for purposes of § 924(c)(3)," *United States* v. *Rafidi*, No. 15-4095, 2016 WL 3670273, at *4 (July 11, 2016). That the Sixth Circuit has issued two decisions reaching opposite, irreconcilable conclusions about whether the same language is vague, echoing the broader circuit conflict, underscores the need for this Court's review.[2]

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[1] See *United States* v. *Acosta*, 470 F.3d 132, 134-137 (2d Cir. 2006) (per curiam), cert. denied, 552 U.S. 1037 (2007); *United States* v. *Fuertes*, 805 F.3d 485, 497-498 (4th Cir. 2015), cert. denied, 136 S. Ct. 1220 (2016); *United States* v. *Williams*, 343 F.3d 423, 431-434 (5th Cir.), cert. denied, 540 U.S. 1093 (2003); *United States* v. *Amparo*, 68 F.3d 1222, 1224-1226 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996); *United States* v. *Serafin*, 562 F.3d 1105, 1107-1108 (10th Cir. 2009); *United States* v. *Kennedy*, 133 F.3d 53, 56-58 (D.C. Cir. 1998); compare *United States* v. *Prickett*, No. 15-3486, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) (per curiam) (non-categorical approach) (citation and internal quotation marks omitted), with *United States* v. *Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (categorical approach).

[2] Because *Shuti*'s statement that the categorical approach is inapplicable under Section 924(c)(3)(B) conflicts with the Sixth Circuit's decisions in *Taylor* and *Rafidi* holding that the categorical approach is applicable, the Acting Solicitor General has authorized the filing of a petition for rehearing en banc in *Shuti* challenging the panel's construction of Section 924(c)(3)(B) and its result-

3. Although acknowledging the circuit conflict, respondent contends (Br. in Opp. 27) that review would be premature because only four circuits have decided the question presented. But among those four are the two circuits with by far the largest immigration dockets in the country, and in total 24 federal appellate judges (including one district judge sitting by designation) have now considered the question, dividing 12-12, in addition to the six judges of the Second and Sixth Circuits who considered the materially identical language of Section 924(c)(3)(B). Further percolation is unlikely to furnish additional insight into whether Section 16(b)'s language is impermissibly vague.

C. This Case Is A Suitable Vehicle To Resolve The Question Presented

Respondent contends (Br. in Opp. 19) that this case is an inadequate vehicle for resolving whether Section 16(b) is unconstitutionally vague because the Court could reverse the judgment below by holding that civil immigration laws are subject to a less rigorous vagueness standard and that Section 16(b) at least satisfies that standard. Such a holding, respondent correctly observes (*ibid.*), "would leave open the question whether the clause is nevertheless unconstitutional under *Johnson* * * * in the context of a criminal prosecution or sentencing proceeding." *Ibid.*

That possibility, however, does not make a criminal case a preferable vehicle, because a criminal case would present the mirror-image risk: If the Court were to hold that Section 16(b) is unconstitutional in

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ing holding that Section 16(b) is unconstitutional. But however the Sixth Circuit resolves that petition, the circuit conflict regarding the constitutionality of Section 16(b) will remain.

the criminal-law context, it would not have the occasion to resolve the question whether the statute is nevertheless constitutional in the immigration context. Whichever type of case this Court hears therefore presents the possibility that the question of Section 16(b)'s constitutionality will not be resolved for the other type of case. And for the reasons stated here and in the certiorari petition, Section 16(b) is constitutional under the standards applicable to criminal laws, and the Court can resolve this case on that ground. Accordingly, given the importance of Section 16(b) for both immigration law and criminal law, this Court's review in this case is warranted.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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QUESTION PRESENTED

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 9
Argument:
Section 16(b), as incorporated into the Immigration and Nationality Act, is not unconstitutionally vague 13
A. Immigration removal laws are not subject to the standard of vagueness applicable to criminal laws 13
1. This Court has long drawn a firm distinction between criminal and civil statutes for vagueness purposes 14
2. Subjecting civil immigration statutes to a lesser standard of definiteness comports with the basic purposes of the vagueness doctrine 20
3. Under the vagueness standard appropriate for provisions applied in immigration removal proceedings, respondent was not denied due process 25
B. Section 16(b) is not unconstitutionally vague under the standard applicable to criminal laws 28
1. Section 16(b) is drafted more precisely than the ACCA's residual clause 29
a. The requirement that the use of force occur "in the course of committing the offense" excludes attenuated risks 31
b. The requirement of a risk that "physical force" "may be used" "against the person or property of another" further narrows the relevant inquiry 36
c. Section 16(b) lacks a confusing list of exemplar crimes 38

Table of Contents—Continued: Page

2. A statute is not unconstitutionally vague merely because it requires categorical consideration of a substantial risk of the use of force in the course of committing a defined offense 40
3. Section 16(b) has not produced any interpretive confusion comparable to the ACCA's residual clause 45
C. Invalidating Section 16(b) would have deleterious consequences for the immigration laws and the federal criminal code 52
Conclusion 56
Appendix — Constitutional and statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

A.B. Small Co. v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) 16, 17, 25
Aguilar v. *Attorney Gen. of the U.S.*, 663 F.3d 692 (3d Cir. 2011) 47
Arizona v. *United States*, 132 S. Ct. 2492 (2012) 13
Barenblatt v. *United States*, 360 U.S. 109 (1959) 20
Barragan-Lopez v. *Holder*, 705 F.3d 1112 (9th Cir. 2013) 55
Begay v. *United States*, 553 U.S. 137 (2008) 37, 38, 40
Bejarano-Urrutia v. *Gonzales*, 413 F.3d 444 (4th Cir. 2005) 51
Bugajewitz v. *Adams*, 228 U.S. 585 (1913) 21
Carachuri-Rosendo v. *Holder*, 560 U.S. 563 (2010) 2, 24
Chrzanoski v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003) 51
City of Mesquite v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) 13, 18
Clark v. *Martinez*, 543 U.S. 371 (2005) 27

Cases—Continued: Page

Colautti v. *Franklin*, 439 U.S. 379 (1979) 15
Collins v. *Kentucky*, 234 U.S. 634 (1914) 15
Delgado-Hernandez v. *Holder*, 697 F.3d 1125 (9th Cir. 2012) 55
Descamps v. *United States*, 133 S. Ct. 2276 (2013) 5, 49
Escudero-Arciniega v. *Holder*, 702 F.3d 781 (5th Cir. 2012) 49
Evans v. *Zych*, 644 F.3d 447 (6th Cir. 2011) 33
Fernandez-Ruiz v. *Gonzales*, 466 F.3d 1121 (9th Cir. 2006) 51
Flores v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003) 51
Galvan v. *Press*, 347 U.S. 522 (1954) 22
Garcia v. *Gonzales*, 455 F.3d 465 (4th Cir. 2006) 51
Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966) 17, 25
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 14
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 21
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 24
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 20, 21
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 28
International Harvester Co. of Am. v. *Kentucky*, 234 U.S. 216 (1914) 14, 16
James v. *United States*, 550 U.S. 192 (2007) 30, 39, 40
Jay v. *Boyd*, 351 U.S. 345 (1956) 28
Jimenez-Gonzalez v. *Mukasey*, 548 F.3d 557 (7th Cir. 2008) 47, 50
Jobson v. *Ashcroft*, 326 F.3d 367 (2d Cir. 2003) 51
Johnson v. *United States*, 135 S. Ct. 2551 (2015) ..... *passim*
Jordan v. *De George*, 341 U.S. 223 (1951) 8, 19, 20, 23
Kerry v. *Din*, 135 S. Ct. 2128 (2015) 46
Kolender v. *Lawson*, 461 U.S. 352 (1983) 15, 21, 23
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 15

Cases—Continued: Page

Lara-Cazares v. *Gonzales*, 408 F.3d 1217 (9th Cir. 2005) 51
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) ..... *passim*
Lisbey v. *Gonzales*, 420 F.3d 930 (9th Cir. 2005), cert. denied, 549 U.S. 868 (2006) 55
Mahler v. *Eby*, 264 U.S. 32 (1924) 16, 21, 22, 23
Marcello v. *Bonds*, 349 U.S. 302 (1955) 21, 22
Mata v. *Lynch*, 135 S. Ct. 2150 (2015) 46
Mellouli v. *Lynch*, 135 S. Ct. 1980 (2015) 46
Negusie v. *Holder*, 555 U.S. 511 (2009) 24
Old Dearborn Distrib. Co. v. *Seagram-Distillers Corp.*, 299 U.S. 183 (1936) 18
Ortega-Mendez v. *Gonzales*, 450 F.3d 1010 (9th Cir. 2006) 51
Oyebanji v. *Gonzales*, 418 F.3d 260 (3d Cir. 2005) 51
Padilla v. *Kentucky*, 559 U.S. 356 (2010) 22
Penuliar v. *Mukasey*, 528 F.3d 603 (9th Cir. 2008) 50
Popal v. *Gonzales*, 416 F.3d 249 (3d Cir. 2005) 51
Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 15
Ramirez v. *Lynch*, 810 F.3d 1127 (9th Cir. 2016) 51
Rodriguez-Castellon v. *Holder*, 733 F.3d 847 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014) 55
Sareang Ye v. *INS*, 214 F.3d 1128 (9th Cir. 2000) 49
Scialabba v. *Cuellar de Osorio*, 134 S. Ct. 2191 (2014) 24
Singh v. *Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) 51
Singh v. *Gonzales*, 432 F.3d 533 (3d Cir. 2006) 51
Skilling v. *United States*, 561 U.S. 358 (2010) 15
Smith v. *Goguen*, 415 U.S. 566 (1974) 23, 41, 52
Solorzano-Patlan v. *INS*, 207 F.3d 869 (7th Cir. 2000) 49

Cases—Continued: Page

Suazo Perez v. *Mukasey*, 512 F.3d 1222 (9th Cir. 2008) 51
Sykes v. *United States*, 564 U.S. 1 (2011) 32, 37, 40
Szucz-Toldy v. *Gonzales*, 400 F.3d 978 (7th Cir. 2005) 51
Taylor v. *United States*, 495 U.S. 575 (1990) 35
Torres v. *Lynch*, 136 S. Ct. 1619 (2016) 34, 41, 42, 46
Tran v. *Gonzales*, 414 F.3d 464 (3d Cir. 2005) 51
United States v. *Alfaro*, 408 F.3d 204 (5th Cir.), cert. denied, 546 U.S. 911 (2005) 51
United States v. *Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009) 48
United States v. *Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), cert. denied, 555 U.S. 1121 (2009) 51
United States v. *Becker*, 919 F.2d 568 (9th Cir. 1990), cert. denied, 499 U.S. 911 (1991) 5
United States v. *Benally*, No. 14-10452 (9th Cir. Nov. 7, 2016) 48
United States v. *Bonilla-Mungia*, 422 F.3d 316 (5th Cir.), cert. denied, 546 U.S. 1070 (2005) 51
United States v. *Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) 51
United States v. *Diaz-Diaz*, 327 F.3d 410 (5th Cir.), cert. denied, 540 U.S. 889 (2003) 33
United States v. *Estrella*, 758 F.3d 1239 (11th Cir. 2014) 51
United States v. *Gomez*, 757 F.3d 885 (9th Cir. 2014) 51
United States v. *Gomez-Guerra*, 485 F.3d 301 (5th Cir.), cert. denied, 552 U.S. 865 (2007) 51
United States v. *Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016) 48
United States v. *Harriss*, 347 U.S. 612 (1954) 15

Cases—Continued: Page

United States v. *Hill*, 832 F.3d 135 (2d Cir. 2016) 48
United States v. *Hull*, 456 F.3d 133 (3d Cir. 2006), cert. denied, 550 U.S. 970 (2007) 34
United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) 16, 17, 18, 45
United States v. *Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007) 51
United States v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963) 15
United States v. *Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010) 51
United States v. *Rodriguez-Moreno*, 526 U.S. 275 (1999) 42
United States v. *Rogers*, 371 F.3d 1225 (10th Cir. 2004) 34
United States v. *Sandoval-Orellana*, 714 F.3d 1174 (9th Cir. 2013) 55
United States v. *Serafin*, 562 F.3d 1105 (10th Cir. 2009) 33, 34
United States v. *Taylor*, 814 F.3d 340 (6th Cir. 2016), petition for cert. pending, No. 16-6392 (filed Oct. 6, 2016) 36
United States v. *Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007) 50
United States v. *Williams*, 553 U.S. 285 (2008) 41, 52
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 10, 13, 14, 16, 20, 25
Villanueva v. *Holder*, 784 F.3d 51 (1st Cir. 2015) 50
Voisine v. *United States*, 136 S. Ct. 2272 (2016) 48
Welch v. *United States*, 136 S. Ct. 1257 (2016) 54
Whyte v. *Lynch*, 807 F.3d 463 (1st Cir. 2015) 51

Cases—Continued: Page

Winters v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) 43
Winters v. *New York*, 333 U.S. 507 (1948) 13, 14, 16
Zivkovic v. *Holder*, 724 F.3d 894 (7th Cir. 2012) 24

Constitution, statutes, regulations and rule:

U.S. Const.:
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 10, 21
Amend. I 14
Amend. V (Due Process Clause) 6, 10, 14, 22, 28, 52, 1a
Amend. VI 22
Act of May 10, 1920, ch. 174, 41 Stat. 593 16
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) 6
18 U.S.C. 924(e)(1) 6
18 U.S.C. 924(e)(2)(B)(ii) 6, 31, 36
Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* 34
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. 10, § 1001(a), 98 Stat. 2136 3
Food Control and the District of Columbia Rents Act, ch. 80, Tit. I, § 2, 41 Stat. 298 17
Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 501(a)(3), 104 Stat. 5048 47
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(43) 3
8 U.S.C. 1101(a)(43)(F) 2, 3, 4, 7, 10, 46, 1a
8 U.S.C. 1101(a)(43)(G) 4, 5, 2a
8 U.S.C. 1101(f)(8) 54
8 U.S.C. 1103(a)(1) 24
8 U.S.C. 1103(a)(3) 24

Statutes, regulations and rule—Continued: Page

8 U.S.C. 1103(a)(5) 24
8 U.S.C. 1158(b)(2)(A)(ii) 54
8 U.S.C. 1226(c) 54
8 U.S.C. 1227(a) 2
8 U.S.C. 1227(a)(2)(A)(iii) 2, 25, 27, 54, 2a
8 U.S.C. 1227(a)(2)(E)(i) 55, 2a
8 U.S.C. 1228(b) 54
8 U.S.C. 1229a 24
8 U.S.C. 1229a(a)(1) 24
8 U.S.C. 1229b(a) 2, 3a
8 U.S.C. 1229b(a)(3) 2, 25, 54, 4a
8 U.S.C. 1229b(b)(1)(C) 54
8 U.S.C. 1229c(b)(1)(C) 54
8 U.S.C. 1326(b)(2) 26
8 U.S.C. 1327 26
8 U.S.C. 1427(a)(3) 54
National Firearms Act, 26 U.S.C. 5801 *et seq.* 34
8 U.S.C. 155(a) (1940) 19
18 U.S.C. 16 ..... 26, 34, 4a
18 U.S.C. 16(a) 50, 51
18 U.S.C. 16(b) ..... *passim*
18 U.S.C. 25(a)(1) 53
18 U.S.C. 119(b)(3) 53
18 U.S.C. 842(p)(2) 53
18 U.S.C. 844(*o*) 53
18 U.S.C. 922(g)(1) 6
18 U.S.C. 922(g)(8) 34
18 U.S.C. 922(g)(9) 34
18 U.S.C. 924(c) 12, 33, 53
18 U.S.C. 924(c)(3)(B) 42, 47, 53, 5a

Statutes, regulations and rule—Continued: Page

18 U.S.C. 924(e)(2)(B)(ii) 6, 31, 36, 6a
18 U.S.C. 929(a)(1) 53
18 U.S.C. 931(a)(1) 53
18 U.S.C. 1028(b)(3)(B) 53
18 U.S.C. 1039(e)(1) 53
18 U.S.C. 1952(a) 53
18 U.S.C. 1956(c)(7)(B)(ii) 53
18 U.S.C. 1959(a)(4) 53
18 U.S.C. 2250(d) 53
18 U.S.C. 2261 (2012 & Supp. II 2014) 53
18 U.S.C. 2261(a) (2012 & Supp. II 2014) 53
18 U.S.C. 3142(f) 53
18 U.S.C. 3181(b)(1) 53
18 U.S.C. 3559(f) 53
18 U.S.C. 3561(b) 53
18 U.S.C. 3663A(c)(1)(A)(i) 53
18 U.S.C. 4042(b)(3)(B) 53
Cal. Penal Code (West 1999):
§ 459 4
§ 460(a) 4
N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016) 43
8 C.F.R.:
Section 1003.1(a)(1) 2
Section 1003.3(a)(1) 24
Sup. Ct. R. 10(a) 46

Miscellaneous:

Ira J. Kurzban, *Immigration Law Sourcebook* (15th ed. 2016) 50
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 34

In the Supreme Court of the United States

No. 15-1498

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 803 F.3d 1110. The decision of the Board of Immigration Appeals (Pet. App. 41a-48a) and the decision of the immigration judge (Pet. App. 49a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2015. A petition for rehearing was denied on January 25, 2016 (Pet. App. 56a). On April 24, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 24, 2016. On May 16, 2016, Justice Kennedy further extended the time to June 10, 2016. The petition was filed on that date and was granted on September 29, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reprinted in an appendix to this brief. See App., *infra*, 1a-6a.

STATEMENT

An immigration judge determined that respondent, an alien, is removable from the United States and is ineligible for the discretionary relief of cancellation of removal because his two state-court convictions for first-degree burglary each qualify as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 49a-55a. The Board of Immigration Appeals (Board) dismissed respondent's appeal. *Id.* at 41a-47a. The Ninth Circuit granted respondent's petition for review, holding that the relevant portion of the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. Pet. App. 1a-20a.

1. The INA specifies classes of aliens who are removable from the United States on the order of the Attorney General. 8 U.S.C. 1227(a). One such class includes any alien convicted of an "aggravated felony" after admission into the United States. 8 U.S.C. 1227(a)(2)(A)(iii). Although the Attorney General generally has discretionary authority (which has been delegated to immigration judges and the Board) to cancel the removal of certain lawful permanent residents (LPRs), see 8 U.S.C. 1229b(a); see also 8 C.F.R. 1003.1(a)(1), the INA prohibits the Attorney General from cancelling the removal of an LPR who has been convicted of an aggravated felony, 8 U.S.C. 1229b(a)(3); see *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010).

The INA defines "aggravated felony" to include certain categories of offenses. 8 U.S.C. 1101(a)(43). One category is any "crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). Section 16 of Title 18, which was enacted in 1984, is the general definition of "crime of violence" in the federal criminal code. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. 10, § 1001(a), 98 Stat. 2136. It provides:

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court held that, because Section 16 "directs [its] focus to the 'offense' of conviction," *id.* at 7, courts must employ the "categorical" approach to determine whether a particular predicate offense meets the statutory definition. See *ibid.* Under that approach, a court must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the individual's] crime." *Ibid.* As particularly relevant here, the Court explained that Subsection (b), by referring to risks arising "in the course of committing the offense," covers offenses that by their nature entail a "risk that the use of physical force against

another might be required in committing [the] crime." *Id.* at 10 (citation omitted).

2. Respondent is a native of the Philippines who was admitted to the United States in 1992 as an LPR. Pet. App. 2a. In both 2007 and 2009, respondent was convicted of first-degree residential burglary in violation of California law. *Ibid.*; see Cal. Penal Code §§ 459, 460(a) (West 1999). Each time he was sentenced to two years in prison. Pet. App. 2a.

In 2010, the Department of Homeland Security (DHS) initiated a removal proceeding against respondent. Pet. App. 42a. DHS charged that respondent is removable because, *inter alia*, his two residential-burglary convictions each qualify as an "aggravated felony" under the INA. See *id.* at 42a-43a. DHS maintained that California first-degree burglary satisfies two alternative subsections of the INA's definition of "aggravated felony": the "crime of violence" provision discussed above, 8 U.S.C. 1101(a)(43)(F), and a provision defining "aggravated felony" to include "a theft offense * * * or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (footnote omitted).

An immigration judge sustained DHS's charges and ordered that respondent be removed from the United States. Pet. App. 49a-55a. The immigration judge concluded that respondent's burglary convictions qualify as "aggravated felon[ies]" under both subsections cited by DHS and thus render respondent removable and ineligible for cancellation of removal. See *id.* at 53a-54a.

The Board dismissed respondent's appeal. Pet. App. 41a-47a. The Board first concluded, contrary to

the immigration judge, that first-degree burglary under California law does not qualify as a "theft offense * * * or burglary offense" under 8 U.S.C. 1101(a)(43)(G). Pet. App. 45a. The Board stated that California burglary does not meet the definition of generic burglary (a requirement under Board precedent) because "[t]he California statute does not require an unlawful entry." *Ibid.*

The Board determined, however, that first-degree burglary under California law does qualify as a "crime of violence" under Section 16(b) and therefore as an "aggravated felony" under the INA. Pet. App. 45a-46a. Relying on *United States* v. *Becker*, 919 F.2d 568 (9th Cir. 1990), cert. denied, 499 U.S. 911 (1991), the Board explained that first-degree burglary "is an offense that by its nature carries a substantial risk of the use of force." Pet. App. 46a. The Board therefore agreed with the immigration judge that respondent is removable and is ineligible for cancellation of removal. *Id.* at 46a-47a.

Board Member Wendtland concurred in the result. Pet. App. 47a-48a. She believed that a burglary offense that does not require an unlawful entry does not meet Section 16(b)'s definition of "crime of violence" because it "does not create a sufficient risk of the use of force." *Id.* at 48a. But she interpreted *Becker* to hold that California first-degree burglary does require an unlawful entry. *Ibid.*[1]

3. Respondent filed a petition for review of the Board's order in the Ninth Circuit.

---

[1] This Court later concluded that "generic unlawful entry is not an element" of the California burglary statute at issue here. *Descamps* v. *United States*, 133 S. Ct. 2276, 2293 (2013).

a. While the petition for review was pending, this Court decided *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). *Johnson* held that one part of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), is unconstitutionally vague. Under the ACCA, a defendant convicted of being a felon in possession of a firearm, see 18 U.S.C. 922(g)(1), who has three or more convictions for a "violent felony" or "serious drug offense" is subject to a minimum sentence of 15 years of imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that * * * is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court had previously construed the so-called "residual clause" of that definition (*i.e.*, the clause beginning with "otherwise") to require a court to determine whether the "ordinary case" of a given predicate offense presents the requisite risk of injury, as opposed to whether the defendant's particular conduct underlying his conviction entailed such a risk. *Johnson*, 135 S. Ct. at 2557.

Johnson held that the ACCA's residual clause violates the Due Process Clause's "prohibition of vagueness in criminal statutes" because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2556-2557. The Court concluded that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, the clause requires courts not only to discern the "ordinary case" of the

offense and determine whether the "physical acts that make up the crime will injure someone," but also to evaluate the risk that injury might occur *after* the commission of the offense—a "speculative" inquiry that is "detached from statutory elements," *id.* at 2557-2558, and could encompass injury "remote from the criminal act," *id.* at 2559. Second, the Court explained, the residual clause is unclear about what level of risk qualifies as a "serious potential risk," especially because the word "otherwise" indicates that the level of risk must be interpreted in light of the four preceding enumerated offenses, which are "far from clear in respect to the degree of risk each poses." *Id.* at 2558 (emphasis and citation omitted). The Court then "confirm[ed] [the residual clause's] hopeless indeterminacy" by pointing to its own "repeated attempts and repeated failures to craft a principled and objective standard" over the course of five cases, *ibid.*, and the "numerous splits among the lower federal courts, where [the clause] has proved nearly impossible to apply consistently," *id.* at 2560 (citation and internal quotation marks omitted).

b. The Ninth Circuit ordered supplemental briefing in this case on the effect of *Johnson*. In a divided decision, the court then granted respondent's petition for review, holding that the definition of "crime of violence" in Section 16(b), as incorporated into the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. Pet. App. 1a-20a.

i. The court of appeals first concluded that "[a]though most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the crite-

ria for deportation." Pet. App. 5a; see *id.* at 5a-7a. In reaching that conclusion, the court relied on this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), which it interpreted to "explicitly reject[] the argument that the vagueness doctrine d[oes] not apply" to civil removal statutes. Pet. App. 6a.

ii. The court then held that, in light of this Court's analysis of the ACCA's residual clause in *Johnson*, Section 16(b) is unconstitutionally vague. Pet. App. 8a-19a. The court observed that both Section 16(b) and the ACCA's residual clause require a court to determine whether a certain degree of risk is posed by the "ordinary case" of the commission of a predicate offense. *Id.* at 8a-9a. On that basis, it concluded that Section 16(b) suffers from "the same combination of indeterminate inquiries" as the ACCA's residual clause: *i.e.*, uncertainty about how to gauge the risk posed by an offense and uncertainty about how much risk is necessary for an offense to meet the statutory definition. *Id.* at 10a; see *id.* at 11a-14a.

The government had pointed to textual differences between Section 16(b) and the ACCA's residual clause, but the court found those differences immaterial. See Pet. App. 14a-19a. The government explained, for example, that Section 16(b) on its face requires the risk to arise "in the course of committing the offense," 18 U.S.C. 16(b), whereas the ACCA's residual clause requires courts to "go[] beyond evaluating the chances that the physical acts that make up the crime will injure someone" and ask whether a risk of physical injury might occur after the offense is committed, *Johnson*, 135 S. Ct. at 2557; see *id.* at 2557-2558. The Ninth Circuit questioned whether Section 16(b) is actually limited in that respect, but

also deemed any such difference irrelevant to *Johnson*'s holding. See Pet. App. 16a-17a. The government further explained that Section 16(b) does not contain "a confusing list of examples" like the four enumerated offenses in the ACCA's residual clause that magnified the uncertainty about the level of risk required. 135 S. Ct. at 2558, 2561. The court, however, was of the view that *Johnson*'s discussion of the four enumerated offenses was not necessary to its holding. Pet. App. 15a-16a. The court also dismissed the fact that, unlike the residual clause in *Johnson*, Section 16(b) has not generated widespread confusion among lower courts and has not been subject to "repeated attempts and repeated failures" by this Court "to craft a principled and objective standard" from the statutory text, *Johnson*, 135 S. Ct. at 2558. See Pet. App. 18a-19a.

Accordingly, the Ninth Circuit held that Section 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. Pet. App. 20a. The court added that its decision did "not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F)." *Id.* at 20a n.17. The court remanded to the Board for further proceedings. *Id.* at 20a.

iii. Judge Callahan dissented. Pet. App. 20a-40a. She concluded that Section 16(b), "as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of the[] shortcomings" that this Court identified in the text of the ACCA's residual clause. *Id.* at 21a; see *id.* at 37a-38a.

SUMMARY OF ARGUMENT

Section 16(b) of Title 18, as applied in civil-immigration proceedings through the INA's definition

of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is not unconstitutionally vague.

A. The Ninth Circuit erred in applying the Due Process Clause's "prohibition of vagueness in criminal statutes," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015), to provisions applied in immigration removal proceedings. This Court has long held that "[t]he degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment," and it has accordingly "expressed greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982). That distinction makes particular sense in the immigration context, given the distinct nature and purpose of removal proceedings and the twin purposes of the vagueness doctrine: to ensure fair notice of what conduct is criminally prohibited and to prevent arbitrary or discriminatory enforcement of criminal laws. The Executive Branch has long been given broad authority in the administration of the immigration laws, in light of their integral connection to foreign relations and national security. Moreover, removal statutes, like other civil provisions, are not subject to the Ex Post Facto Clause, so an alien has no constitutionally grounded expectation of fair notice about a basis for removal. And the framework for the conduct of removal proceedings provides for centralized control over their institution and adjudication and for authoritative interpretations of statutory provisions by the Attorney General.

Although the Court has on occasion tested civil provisions for vagueness, it has struck down those provisions under the Due Process Clause because they

were so unintelligible as to effectively supply no standard at all. Whatever the potential interpretive difficulties that the text of Section 16(b) might raise, it is not unintelligible. And the fact that the text has criminal applications does not mean that the criminal-law vagueness standard governs its applications in removal proceedings. Federal statutes often define terms that are used in both civil and criminal provisions. Yet it has never been understood that parties to civil disputes can invoke the "Constitution's prohibition of vague criminal laws" to invalidate statutory definitions. *Johnson*, 135 S. Ct. at 2556.

B. Even under the vagueness standard applicable to criminal laws, Section 16(b) comports with due process. To the government's knowledge, before this Court's 2015 decision in *Johnson*, which declared the residual clause of the Armed Career Criminal Act unconstitutionally vague, no lower court or Justice of this Court had suggested that Section 16(b) raised constitutional vagueness concerns. To the contrary, this Court construed and applied that provision without evident difficulty in its unanimous decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), more than a decade ago. And this Court has not granted review in any other case involving the applicability of Section 16(b) to a particular offense in the more than three decades since the statute was enacted.

That stability in this area of the law is directly attributable to the more precise text of Section 16(b). It is true that Section 16(b), like the ACCA's residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense; that is a consequence of the categorical approach. But the similarity ends there. As *Leocal* explained, the Section 16(b)

risk analysis is expressly limited to risks that occur "in the course of committing the offense," 543 U.S. at 11 (citation omitted), whereas the ACCA's residual clause required an open-ended inquiry into conduct and results that may arise after the completion of the offense. See *Johnson*, 135 S. Ct. at 2557-2558. Section 16(b) focuses on a more sharply defined category of risk—the use of physical force against person or property in the course of committing the offense—while the ACCA's residual clause subsumed all physical injury that might bear a causal connection to the offense. And whereas this Court found that the ACCA's accompanying list of exemplar offenses exacerbated the text's imprecision because they each entail quite different levels of risk, see *id.* at 2558, Section 16(b) contains no such mystifying list.

Given those textual differences, and the absence of any comparable history of interpretive turmoil, no sound basis exists to invalidate an Act of Congress that supplies a critical definition for numerous immigration and criminal provisions—and that is materially identical to the definition of "crime of violence" in the oft-prosecuted offense set forth at 18 U.S.C. 924(c). Rather, this Court, based on the limits imposed by the plain text of the provision, should confirm that the statute has a comprehensible core that ensures that the commission of a clearly dangerous felony triggers removal under the immigration laws.

ARGUMENT

SECTION 16(b), AS INCORPORATED INTO THE IMMIGRATION AND NATIONALITY ACT, IS NOT UNCONSTITUTIONALLY VAGUE

A. Immigration Removal Laws Are Not Subject To The Standard Of Vagueness Applicable To Criminal Laws

The Ninth Circuit erred in holding that the Constitution's "prohibition of vagueness in *criminal* statutes," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015) (emphasis added), applies to statutory provisions applied in immigration removal proceedings. "Removal is a civil, not criminal, matter." *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). This Court has long held that the vagueness doctrine does not apply with the same force to statutes applied in civil proceedings. As the Court has explained, "[t]he degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment," and the Court has thus "expressed greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982); see *Winters* v. *New York*, 333 U.S. 507, 515 (1948); see also *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 290 (1982).

That distinction makes sense given that the constitutional objectives of the vagueness doctrine in criminal cases—to ensure fair notice of what conduct is proscribed and to prevent arbitrary and discriminatory enforcement by police officers, judges, and juries—have far less force in the civil context. That is especially so with respect to removal proceedings. Here, respondent suffered no deprivation of due process when the Board determined that his burglary convic-

tions qualify as aggravated felonies under the INA and therefore require his removal.

1. This Court has long drawn a firm distinction between criminal and civil statutes for vagueness purposes

This Court has long recognized that "[t]he standards of certainty in statutes punishing * * * offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters*, 333 U.S. at 515; see *Village of Hoffman Estates*, 455 U.S. at 498-499. The Court should reaffirm that bedrock distinction.[2]

a. The vagueness doctrine did not exist as a constitutional limitation on legislation at the time of the Founding. See *Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring in the judgment). "[C]ourts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law." *Ibid.* Thus, "rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly." *Id.* at 2568. The Court first struck down a criminal statute under the vagueness doctrine in 1914, see *International Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 216, 223-224, holding that Kentucky antitrust laws that based criminal liability on a determination of the "real value" of an article

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[2] This Court has recognized "a more stringent vagueness test," *Village of Hoffman Estates*, 455 U.S. at 499, for statutes that "abut[] upon sensitive areas of basic First Amendment freedoms," *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972) (citation omitted). First Amendment activity is not at issue here.

"violated the fundamental principles of justice embraced in the conception of due process of law," *Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914). See *Johnson*, 135 S. Ct. at 2570 (Thomas, J., concurring in the judgment).

Since that time, this Court has repeatedly described the core due process vagueness principle as a limitation on criminal statutes. "As generally stated," the Court has explained, "the void-for-vagueness doctrine requires that a *penal statute* define the *criminal offense* with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (emphases added); see *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994).[3] "The underlying principle is that no man shall be held *criminally responsible* for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954) (emphasis added). And in *Johnson* itself, the Court repeatedly described the vagueness doctrine as a due process limitation on criminal statutes. See 135 S. Ct. at 2555 ("Constitution's prohibition of vague criminal

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[3] See also, *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 390 (1979) ("[A]s a matter of due process, a *criminal* statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness.") (emphasis added) (internal citations and quotation marks omitted); see also, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010); *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

laws"); *id.* at 2556 (same, twice); *id.* at 2556-2557 ("prohibition of vagueness in criminal statutes").

b. As the Court recognized in *Village of Hoffman Estates*, it has on occasion analyzed whether civil statutes are too vague to comport with due process. 455 U.S. at 498-499. Those decisions—including decisions analyzing immigration removal statutes—reflect the settled understanding that the vagueness doctrine permits "greater tolerance of enactments with civil rather than criminal penalties." *Ibid.*; see *Winters*, 333 U.S. at 515.

Significantly, for example, in *Mahler* v. *Eby*, 264 U.S. 32 (1924), the Court considered aliens' challenge to an immigration statute that vested the Secretary of Labor with authority to deport certain "undesirable residents of the United States." Act of May 10, 1920, c. 174, 41 Stat. 593. Writing for a unanimous Court, Chief Justice Taft rejected the aliens' argument that the statutory language was "vague" under the principles of *International Harvester*, *supra*, and another decision holding a criminal statute unconstitutionally vague, *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 86 (1921). 264 U.S. at 40-41. He explained that those "were both criminal cases," and "[t]he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers." *Id.* at 41.

The following year, in *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925), this Court first held that a statute invoked in a civil proceeding was unconstitutionally vague. The Court had previously concluded in *L. Cohen Grocery* that a provision of federal law subjecting to criminal liability any person who made "any unjust or unreasonable rate or

charge in handling or dealing in or with any necessaries" was void for vagueness. 255 U.S. at 86 (quoting The Food Control and the District of Columbia Rents Act, ch. 80, Tit. I, § 2, 41 Stat. 298); see *id.* at 89-93. The Court had determined that the statutory language "le[ft] open * * * the *widest conceivable inquiry*" and "forb[ade] no specific or definite act." *Id.* at 89 (emphasis added). In *A.B. Small*, a defendant in a breach-of-contract action invoked the same provision to assert the defense that the relevant contracts were invalid, but the Court held that the provision could not be invoked in that context either. 267 U.S. at 235, 237-242. The Court explained that the holding of *L. Cohen Grocery*—that the statutory standard "was so vague and indefinite as really to be *no rule or standard at all*"—was not "applicable only to criminal prosecutions." *Id.* at 239 (emphasis added). "A prohibition so indefinite as to be *unintelligible*," the Court held, "is not a prohibition by which conduct can be governed." *Id.* at 240 (emphasis added; citation omitted). Given the essentially standardless—indeed, "unintelligible"—statute at issue in *A.B. Small*, the Court's invalidation of the statute is consistent with the principle that a less searching form of the vagueness doctrine applies in civil proceedings.

Similarly, in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court held unconstitutionally vague a statute authorizing juries to impose court costs on acquitted defendants, and requiring the State to imprison acquitted defendants until they paid the assessed costs, without determining whether the statute should be classified as civil or penal. *Id.* at 402-405. The Court held that the statute was unconstitutional because it "contain[ed] *no standards at all*, nor d[id] it

place any conditions of any kind upon the jury's power to impose costs," and state-court interpretations of the statute had left jurors to apply "their own notions of what the law should be." *Id.* at 403 (emphasis added). Given the lack of any standard in the statute, that holding, like *A.B. Small*, is consistent with a more deferential vagueness limitation for civil statutes. See also *Old Dearborn Distrib. Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, 185-186, 196-197 (1936) (concluding that phrase "fair and open competition" in Illinois statute regulating certain commodities contracts was sufficiently definite that "'a standard of some sort was afforded'") (quoting *L. Cohen Grocery*, 255 U.S. at 92).

The Court drew the distinction between criminal and civil laws particularly clearly in *City of Mesquite*, *supra*, a vagueness challenge to a city ordinance governing the licensing process for amusement establishments. 455 U.S. at 284-288. The Court ultimately upheld the provision on the ground that the assertedly vague provision, which directed authorities to consider the applicant's "connections with criminal elements," did not in fact supply the standard for licensing decisions. *Id.* at 290-291. But the Court made clear at the outset of its analysis that the vagueness standard applicable to civil licensing provisions is less searching than the criminal-law standard: "We may assume that the definition of 'connections with criminal elements' in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection," the Court stated, and "we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center." *Id.* at 290. The import of that statement is that licensing qualifi-

cations are not subject to the same vagueness test as criminal provisions.

c. In applying the vagueness standard applicable in criminal proceedings, the Ninth Circuit relied principally on this Court's post-*Mahler* decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), which upheld a provision of federal immigration law as sufficiently definite. That reliance was misplaced. Not only is the result in *Jordan* consistent with this Court's pronouncements about the difference between civil and criminal laws for vagueness-doctrine purposes, but its analysis reinforces that distinction.

Jordan construed a statute providing for the deportation of an alien convicted more than once for "any crime involving moral turpitude." 341 U.S. at 225 (quoting 8 U.S.C. 155(a) (1940)). The Court held that the statute encompassed the offense of conspiracy to defraud the United States of taxes on distilled spirits. *Id.* at 223-224, 229. Responding to an argument raised by the dissent but not by the alien, the Court went on to consider whether "the phrase 'crime involving moral turpitude' lacks sufficiently definite standards to justify this deportation proceeding and [whether] the statute [at issue was] therefore unconstitutional for vagueness." *Id.* at 229. Importantly, the Court explained that "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct," and it "emphasized that this statute does not declare certain conduct to be criminal." *Id.* at 230 (emphasis added; citation omitted).

The Court nevertheless elected to "examine the application of the vagueness doctrine to this case * * * in view of the grave nature of deportation." 341

U.S. at 231. And it proceeded to "test th[e] statute under the established criteria of the 'void for vagueness' doctrine." *Ibid.* But *Jordan* did not thereby hold—in a case where the issue was not briefed or argued—that the same standard of definiteness applies to civil removal statutes. It had no need to decide that issue, because the Court ultimately concluded that fraud crimes were encompassed by the phrase "crime involving moral turpitude." See *id.* at 231-232. The Court did not address whether the provision would necessarily have been invalid if it did not meet the criminal-law standard. Nor did it suggest that it was overruling *Mahler*.

Jordan therefore does not cast doubt on the proposition that the Constitution tolerates a lesser "degree of vagueness," *Village of Hoffman Estates*, 455 U.S. at 498, for criminal statutes than for laws with only civil consequences. Indeed, Justice Black, joined by Chief Justice Warren and Justice Douglas, later cited *Jordan* for the proposition that, "[f]or obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes." *Barenblatt* v. *United States*, 360 U.S. 109, 137 & n.2 (1959) (dissenting on other grounds).

2. Subjecting civil immigration statutes to a lesser standard of definiteness comports with the basic purposes of the vagueness doctrine

The Court's longstanding distinction between criminal and civil statutes makes particular sense in the immigration context. A removal proceeding "is a purely civil action to determine eligibility to remain in the country," not to punish the alien for past conduct. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The proceeding "looks prospectively," and "[p]ast

conduct is relevant only insofar as it may shed light on the [alien's] right to remain." *Ibid.* Thus, even where removal is based on a past criminal conviction, removal is not a punishment or penalty for the crime. Rather, Congress has simply provided for expulsion of aliens who have demonstrated that "their continued presence here would not make for the safety or welfare of society." *Mahler*, 264 U.S. at 39; accord *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913) (Congress provided for "deportation of aliens whose presence in the country it deem[ed] hurtful").

Moreover, because of the distinctive nature and purpose of removal proceedings, the principal concerns of the vagueness doctrine have far less force in that context. As *Johnson* explained, the doctrine is designed to ensure that a criminal statute "give[s] ordinary people fair notice of the conduct it punishes" and is not "so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556 (citing *Kolender*, 461 U.S. at 357-358). Neither of those constitutional values is implicated to remotely the same extent by removal proceedings.

a. The fair-notice concern has little force in the removal context because, unlike criminal statutes, removal statutes are not subject to the Constitution's prohibition on ex post facto laws. Indeed, "[i]t always has been considered that that which [the Ex Post Facto Clause] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment," and "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); see *Marcello* v. *Bonds*, 349 U.S. 302, 314

(1955); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954); *Mahler*, 264 U.S. at 39. Thus, for example, this Court in *Marcello* upheld the removal of an alien based on a conviction for an offense that "was not ground for deportation at the time he committed the offense." 349 U.S. at 314.

If Congress may, as in *Marcello*, retroactively subject an alien to removal based on a past criminal conviction, an alien has no constitutionally cognizable expectation that he will not be removed due to his criminal record or some other basis that was not identified in the law existing at the time. The fair-notice aspect of the vagueness doctrine therefore has little force in the civil immigration context.

This Court has held that the Sixth Amendment requires a criminal-defense attorney to "inform her client whether his plea carries a risk of deportation." *Padilla* v. *Kentucky*, 559 U.S. 356, 374 (2010). That holding, however, does not suggest that the Due Process Clause affords a criminal defendant a right to notice that he will or will not be subject to deportation. Rather, the *Padilla* rule rests on the conclusion that "when the deportation consequence [of a guilty plea] is truly clear" under existing law, a competent lawyer would advise his client about that consequence before the client pleads guilty. *Id.* at 369. But *Padilla* also recognized that in many cases "the law is not succinct and straightforward," in which case "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ibid.* That reduced obligation even with respect to existing law underscores that aliens may lack clear

notice about the immigration consequences of criminal convictions.

b. The other major objective of the vagueness doctrine is to avoid "arbitrary enforcement" of criminal laws by ensuring that the "'legislature establish[es] minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)). The concern is that when the legislature "abdicate[s] [its] responsibilities for setting the standards of the criminal law," it "allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575.

That aspect of the vagueness doctrine has less force, and the concern it reflects is far less pronounced, in the context of civil immigration proceedings. Immigration law and its enforcement are intrinsically bound up with the Nation's foreign relations and national security, in which the Constitution assigns the President a substantial role. Congress accordingly has long vested the Executive Branch with broad authority in the administration of the Nation's immigration laws, including in the removal of aliens from the United States. In doing so, it has often spoken in broad phrases, such as "undesirable residents," *Mahler*, 264 U.S. at 40, or "crime of moral turpitude," *Jordan*, 341 U.S. at 225, that inherently confer a degree of interpretive judgment on the Executive Branch. In this constitutional and statutory context, it would be particularly unwise to impose a rigid version of the vagueness doctrine.

That conclusion is reinforced by the framework under which the Executive Branch administers the INA, which has the salutary effect of reducing the potential for inconsistent interpretation and enforcement.

Institution of removal proceedings is under the unified control of the Secretary of Homeland Security. See 8 U.S.C. 1103(a)(1), (3), and (5). The Attorney General, in turn, is charged with conducting removal proceedings, 8 U.S.C. 1229a, and with rendering interpretations of the INA that are binding on the Executive Branch, see 8 U.S.C. 1103(a)(1). Although an immigration judge makes an initial determination on removal, 8 U.S.C. 1229a(a)(1), either the alien or DHS has a right to appeal an adverse decision to the Board, 8 C.F.R. 1003.3(a)(1). The provision for centralized review by the Board, on behalf of the Attorney General, promotes consistent interpretations across cases.

The Board's decisions are ultimately subject to judicial review by the regional courts of appeals, potentially leading to inconsistent rulings. See *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010). But that is an unremarkable feature of federal judicial administration, and its significance is mitigated by the courts' obligation to give *Chevron* deference to reasonable Board interpretations of immigration statutes. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.); *id.* at 2214 (Roberts, C.J., concurring in the judgment); *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). And although courts do not afford *Chevron* deference to the Board's interpretation of a criminal provision incorporated by reference into the INA, see *Zivkovic* v. *Holder*, 724 F.3d 894, 897-898 (7th Cir. 2012), the Board's centralized initial review still serves to reduce the risk of disparate outcomes.

c. Accordingly, this Court's longstanding view that civil statutes are subject to a less searching standard

of definiteness than criminal statutes is particularly sound in the immigration context, in light of the special nature of removal proceedings and the basic purposes of the vagueness doctrine.

3. Under the vagueness standard appropriate for provisions applied in immigration removal proceedings, respondent was not denied due process

Under the vagueness standard appropriate for immigration removal proceedings, respondent was not denied due process when the Board concluded that he was removable under 8 U.S.C. 1227(a)(2)(A)(iii), and was ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3).

a. Although this Court has "expressed greater tolerance of enactments with civil rather than criminal penalties," *Village of Hoffman Estates*, 455 U.S. at 498-499, it has not previously announced a verbal formulation for when a provision applied in a civil proceeding is unconstitutionally vague. But the decisions in which the Court has applied the vagueness doctrine to strike down civil provisions suggest a general principle. In those cases, the Court determined that the statute was so "unintelligible" that it was essentially "not a rule at all." *A.B. Small*, 267 U.S. at 240 (citation omitted); see *Giaccio*, 382 U.S. at 403 ("no standards at all"); cf. *Johnson*, 135 S. Ct. at 2568 n.3 (Thomas, J., concurring in the judgment) (noting that "early American state courts * * * sometimes refused to apply a law they found completely unintelligible, even outside of the penal context").

That standard—unintelligibility—is meaningfully less stringent than the criminal standard, which asks whether "a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it pun-

ishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. The latter formulation, though also very deferential to legislative draftsmanship, would be a poor fit in the context of this case, in which the Executive Branch has historically been afforded broad authority in the administration of the immigration laws, aliens do not have a constitutionally protected expectation of fair notice of the type of conduct that may be a basis for their removal, and centralized administration renders the arbitrary-enforcement concern less pronounced. At the same time, a test of unintelligibility would ensure that an alien is not subject to a proceeding governed by an incomprehensible legal standard. It would also ensure that immigration officials and courts are not obligated to enforce legal provisions from which it is impossible to discern any meaning, preserving the integrity of the immigration system.

b. In this Court, the basis for the removal of respondent turns on the INA's definition of "aggravated felony." That definition incorporates 18 U.S.C. 16, a definitional provision of the federal criminal code that has many criminal applications, and it is the text of Section 16(b) that the Ninth Circuit found to be unconstitutionally vague. In addition, the definition of "aggravated felony" itself, 8 U.S.C. 1101(a)(43), has criminal applications within the INA. See 8 U.S.C. 1326(b)(2), 1327. Respondent argued at the certiorari stage (Br. in Opp. 18) that because the assertedly vague language at issue here has criminal applications, the criminal-law vagueness standard should apply.

That contention is mistaken. Congress could have adopted precisely the same statutory regime by re-

producing the text of Section 16 verbatim in the provision rendering respondent removable. 8 U.S.C. 1227(a)(2)(A)(iii). That Congress chose the statutory shortcut of defining the term "aggravated felony" for the entire INA, and cross-referencing Section 16 as part of that definition, does not change the critical fact that the statutory language operates in this case as part of a civil removal provision, not as an element of a criminal offense or as a criminal-penalty provision. After all, many definitional provisions of federal statutes have both civil and criminal applications, but it has never been thought that parties to civil suits could challenge those provisions under the criminal-law vagueness standard.

Respondent also adverted (Br. in Opp. 18) to the principle that a court must interpret the same statute consistently across applications. See *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). That principle means, for example, that Section 16(b) could not be interpreted one way in an immigration case and another way in a criminal case. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). But it does not mean that, if the Court were to conclude that the statutory text were too indeterminate to support criminal liability, the Court would also be required to conclude that it is too vague to be applied in a civil removal proceeding. To hold that a statute is valid as applied in one setting but not in another is not to "give the[] same words a different meaning" in the two contexts, *Clark*, 543 U.S. at 378, but rather to recognize that the demand for textual clarity is greater when criminal liability is at stake.

c. Under a standard of basic intelligibility, respondent was not denied due process. The language of Section 16(b) that is incorporated into the INA

provisions at issue here is plainly intelligible. As explained in greater detail below, the language of Section 16(b) has been applied by lower courts for over three decades without producing pervasive circuit conflicts and without any significant suggestion that the statute raises vagueness concerns. See pp. 45-52, *infra*. In two pages of analysis, this Court unanimously construed the provision not to encompass drunk-driving offenses—a problem that vexed the Court in the ACCA context. See *Leocal*, 543 U.S. at 10-11. Whatever the potential interpretive difficulties raised by applying Section 16(b)'s general risk standard categorically, the statutory language is not so opaque as to effectively lack any standard at all and to bar its application as a basis for removal of an alien.[4]

B. Section 16(b) Is Not Unconstitutionally Vague Under The Standard Applicable To Criminal Laws

Even under the same vagueness standard applicable to criminal laws, Section 16(b) is not unconstitutionally vague. Section 16(b) has not produced a cacophony of interpretive confusion and conflicting decisions, as the ACCA's residual clause did. That is no accident. It is the direct product of the distinctive textual features of Section 16(b) that sharpen its focus

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[4] The definition of aggravated felony was applied here not only as a basis for respondent's removal, but also for determining that he is ineligible for discretionary relief from cancellation of removal. Pet. App. 46a-47a, 54a. Because discretionary relief from removal is not a "matter of right" but rather a "matter of grace," *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956), akin to "the President's [power] to pardon a convict," *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted), the Due Process Clause, including the vagueness doctrine, allows Congress especially broad latitude to confer discretion on the Executive in granting such relief.

and make its application more predictable. This Court should accordingly hold that the language of Section 16(b), which applies to many provisions of the INA and the federal criminal code, is not unconstitutionally vague.

1. Section 16(b) is drafted more precisely than the ACCA's residual clause

Johnson held that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, not only does the ACCA's residual clause require courts to conduct an "ordinary case" analysis to determine the risk posed by an offense, but, "[c]ritically, * * * assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-2558. Thus, "the court's task * * * goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" and encompasses the question whether the ordinary offender "might engage in violence *after*" completing the offense. *Id.* at 2557. Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," both because of the difficulty of "apply[ing] an imprecise 'serious potential risk' standard to * * * a judge-imagined abstraction," and because "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id.* at 2558. Those four crimes, the Court explained, "are far from clear in respect to the degree of risk each poses," and their inclusion thus obscures the degree of risk necessary for an unenumerated offense to qualify under the ACCA's residual clause. *Ibid.* (citation and

internal quotation marks omitted); see *id.* at 2559 ("[T]he enumerated crimes are not much more similar to one another in kind than in degree of risk posed.")

Section 16(b), like the ACCA's residual clause, requires courts to conduct an "ordinary case" analysis. The statute asks whether a given offense "by its nature" poses the requisite risk, indicating that the risk analysis must be conducted categorically rather than based on the specific facts of a felon's prior conviction. *Leocal*, 543 U.S. at 7. And given that "[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk," *James* v. *United States*, 550 U.S. 192, 208 (2007), the categorical question is whether the commission of the offense would *ordinarily* give rise to the risk, not whether it always would.

But although both Section 16(b) and the ACCA's residual clause require an "ordinary case" analysis, three textual features of Section 16(b) make that inquiry substantially more precise, predictable, and judicially administrable. First, Section 16(b) requires the risk to arise in "the course of committing the offense," and therefore excludes risks arising after the offense is completed—the aspect of the residual clause's risk analysis that *Johnson* characterized as "[c]ritical[]" to its vagueness holding, 135 S. Ct. at 2557. Second, Congress tailored the statutory standard to the risk that "physical *force*" against person or property will be "used" in the course of committing the offense, which describes a more concrete range of conduct than the ACCA's reference to any offense conduct that could result in physical injury. 18 U.S.C. 16(b) (emphasis added). Third, Congress did not include a confusing list of exemplar crimes, and so

freed courts from having to conduct the analysis by reconciling the different risks entailed in the listed offenses. Combined, those distinctive features of Section 16(b) render it consistent with the tenets of due process.

a. The requirement that the use of force occur "in the course of committing the offense" excludes attenuated risks

i. Unlike the ACCA's residual clause, Section 16(b) provides that the requisite risk must arise "in the course of committing the offense." For that reason, this Court held in *Leocal* that Section 16(b)'s risk analysis "relates *not* * * * to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be *required in committing a crime*." 543 U.S. at 10 (second emphasis added).

That textual limitation serves in part as a temporal restriction on the scope of the risk analysis; unlike with the ACCA's residual clause, a court may not consider risks arising *after* the course of committing the offense is completed. But the limitation is also functional: The substantial risk that physical force will be used in committing the offense must stem from the nature of the acts that constitute the offense. By the statute's express terms, a more remote or attenuated potential use of force is not enough to bring a crime within Section 16(b). That requirement stands in contrast to the looser connection set out in the ACCA's residual clause, which asks only whether the crime entails "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). That standard could be satisfied by a risk of injury that had only an indirect connection to

the commission of the elements of the offense—such as the accidental injury of a pedestrian by a police cruiser during a high-speed pursuit. See *Sykes* v. *United States*, 564 U.S. 1, 8-9 (2011). Section 16(b), by contrast, captures only the risk that "the offender" himself will use force, and then only in the course of committing the crime.

By so limiting the risk inquiry, Section 16(b) ensures that the categorical "ordinary case" analysis is far more manageable and predictable than in the ACCA context. The ACCA's residual clause effectively called for a double act of imagination: A court was required *first* to imagine what events might take place after completion of the offense and *then* to ask whether those events might result in physical injury to another person. But Section 16(b) eliminates the first inquiry entirely (and, for reasons explained in the next subsection, transforms the second into a far more specific focus on offender conduct). Rather than imagining a hypothetical series of events that might ensue after the crime, a court need only consider the offense as defined—for example, entering or remaining in a structure unlawfully with the intent to commit a felony—and then determine whether there exists a substantial risk that an offender would use physical force against person or property in the course of committing the offense. That is a significantly more focused inquiry, because the conduct to which the risk analysis is applied is the product of statutory definition, not judicial imagination.

ii. In practice, the statutory limitation to risks arising "in the course of committing the offense" means that hard cases under the ACCA's residual clause are easier cases under Section 16(b). For example, the

offense at issue in *Johnson* itself was unlawful possession of a short-barreled shotgun. Whether that offense was covered had divided the lower courts. See U.S. Br. in Opp. at 11-20, *Johnson*, *supra* (No. 13-7120). As *Johnson* explained, that had proved to be a difficult question because it required courts to decide whether to "consider the possibility that the person possessing the shotgun will later use it to commit a crime," and thus whether "a crime may qualify under the residual clause even if the physical injury is remote from the criminal act." 135 S. Ct. at 2559. And indeed, that statutory question divided the three Justices who dissented from *Johnson*'s vagueness holding. Compare *id.* at 2564-2566 (Thomas, J., concurring in the judgment), with *id.* at 2582-2584 (Alito, J., dissenting).

But since *Leocal*, courts of appeals considering weapons-possession offenses under Section 16(b)—or under the materially identical definition of "crime of violence" in 18 U.S.C. 924(c), which subjects to criminal punishment anyone who uses, carries, or possesses a firearm with a specified connection to a crime of violence—have widely concluded that they do not qualify as crimes of violence. They have reached that conclusion precisely because an act of possession does not in itself give rise to a substantial risk that the offender will use physical force against another person in the course of committing the offense.[5] Those courts

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[5] See *United States* v. *Diaz-Diaz*, 327 F.3d 410, 413-414 (5th Cir.) ("[P]hysical force against the person or property of another need not be used to complete [that] crime. Instead, it is complete upon, *inter alia*, mere knowing possession of the weapon.") (brackets in original; internal citation and quotation marks omitted), cert. denied, 540 U.S. 889 (2003); see also *Evans* v. *Zych*, 644 F.3d 447,

have explained that "*Leocal* instructs us to focus not on whether possession will likely result in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession." *United States* v. *Serafin*, 562 F.3d 1105, 1113 (10th Cir. 2009) (emphasis omitted); cf. *Torres* v. *Lynch*, 136 S. Ct. 1619, 1629-1630 (2016) (observing that 18 U.S.C. 16, as incorporated into the INA's aggravated-felony provision, "would not reach felon-in-possession laws and other [federal] firearms offenses"). That consensus illustrates how the distinctive textual features of Section 16(b) clarify and narrow the interpretive task.

iii. That conclusion is consistent with the legislative history of Section 16, in which the Senate Report stated that Section 16(b) would cover "offenses such as burglary * * * inasmuch as such an offense would involve the substantial risk of physical force [being used] against another person or against the property." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983). Consistent with that statement, *Leocal* observed that "burglary" is the "classic example" of a Section 16(b) offense because "burglary, by its nature, involves a substantial risk that the burglar will use force against

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453 (6th Cir. 2011) (illegal possession and transfer of firearm regulated by National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.*); *United States* v. *Serafin*, 562 F.3d 1105, 1114 (10th Cir. 2009) (possession of unregistered firearm in violation of NFA); *United States* v. *Hull*, 456 F.3d 133, 137-141 (3d Cir. 2006) (possession of pipe bomb), cert. denied, 550 U.S. 970 (2007); cf. *United States* v. *Rogers*, 371 F.3d 1225, 1232 (10th Cir. 2004) (holding that 18 U.S.C. 922(g)(8) and (9)—prohibiting possession of a firearm by a person under a protective order or convicted of a misdemeanor crime of domestic violence—are crimes of violence under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*).

a victim in completing the crime." 543 U.S. at 10. The conclusion that burglary risks the use of force makes sense. Generic burglary consists of the act of unlawful entry into, or remaining in, a building or structure, see *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), and the act of entry or remaining will typically entail the risk that force will be used against persons or property in the course of committing the offense. Courts have no need to look beyond the conduct constituting the offense to identify that risk.

In *Johnson*, the Court described the risk of violence in burglary by emphasizing post-entry events, stating that "[t]he act of * * * breaking and entering into someone's home does not, in and of itself, normally cause physical injury" to a person, but instead the "risk of injury arises because * * * the burglar might confront a resident in the home *after* breaking and entering." 135 S. Ct. at 2557.[6] Consideration of subsequent conduct, the Court reasoned, launches courts on an indeterminate inquiry because it moves away from "the physical acts that make up the crime." *Ibid.* Section 16(b), unlike the ACCA's residual clause, is directed exclusively to risks arising "in the course of committing the offense," thus foreclosing inquiry into subsequent consequences.

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[6] *Johnson* expressed some doubt about the moment-of-entry risk to persons in burglary. The Court did not, however, expressly consider that the offense of generic burglary also includes remaining in a structure after entering. In any event, the Court did not question that "the physical acts that make up the crime" of burglary, 135 S. Ct. at 2557, will characteristically pose a substantial risk that physical force will be used against a person *or against property*. The latter is sufficient to bring an offense within Section 16(b), although not within the ACCA's residual clause.

b. The requirement of a risk that "physical force" "may be used" "against the person or property of another" further narrows the relevant inquiry

i. The second critical feature of Section 16(b) is that its text defines a more concrete *type* of risk. Whereas the ACCA's residual clause covers any offense posing a serious potential risk that "physical injury" will occur, 18 U.S.C. 924(e)(2)(B)(ii), Section 16(b) refers to a substantial risk that "physical *force* against the person or property of another may be *used*" in committing the offense. 18 U.S.C. 16(b) (emphases added). The "use" of "physical force" against the person or property of another is a significantly more specific and focused requirement than the ACCA's general risk-of-injury requirement. Section 16(b) trains solely on whether the defendant himself might engage in a certain type of behavior—using physical force—in the course of committing the offense, not whether his actions may produce physical injury in a more tangential or attenuated way. See *United States* v. *Taylor*, 814 F.3d 340, 376-377 (6th Cir. 2016) ("Risk of physical force against a victim is much more definite than risk of physical injury to a victim."), petition for cert. pending, No. 16-6392 (filed Oct. 12, 2016).

As a result, the "ordinary case" risk analysis is more targeted under Section 16(b) than under the ACCA. Although a court must determine the most likely ways in which a person would commit the offense, the court need not speculate about a chain of causation that could possibly result in a victim's injury. Rather, the court must determine only whether there exists a substantial risk that statutorily defined conduct—breaking into a home, for example, or resist-

ing arrest—would entail the use of physical force against property or another person. That inquiry does not call for the sort of speculation that the ACCA did.

ii. Like Section 16(b)'s limitation to risks arising in the course of committing the offense, the statute's exclusive focus on the use of physical force has produced easy cases for offenses that posed vexing problems under the ACCA's residual clause. For example, the question whether drunk-driving offenses fall under the ACCA's residual clause divided this Court three ways. See *Begay* v. *United States*, 553 U.S. 137 (2008). The majority in *Begay* concluded that the residual clause did not encompass drunk-driving offenses because they do not involve "purposeful, violent, and aggressive conduct" but rather are more akin to "crimes that impose strict liability"—an extratextual legal test that the Court later repudiated in large part. *Id.* at 145; see *Sykes*, 564 U.S. at 12-13. Both Justice Scalia's concurrence and the three-Justice dissent in *Begay* rejected the majority's approach but sharply disagreed over whether drunk driving posed the requisite risk. See 553 U.S. at 148-154 (Scalia, J., concurring in the judgment); *id.* at 155-163 (Alito, J., dissenting).

By contrast, this Court concluded in *Leocal* that drunk-driving offenses do not fall under Section 16(b) in two pages of a unanimous opinion that has never been called into question. See 543 U.S. at 10-11. The Court explained that because Section 16(b) requires a risk of "the use of physical force against the person or property of another," it "requir[es] a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11. Underscoring the

determinacy of the statutory language, the Court concluded that "[i]n no ordinary or natural sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Ibid.* (internal quotation marks omitted).

Section 16(b)'s distinctive language therefore made quick work of a broad category of offenses—those where the risk of injury arises from accidental or negligent conduct rather than active violence—that had engendered confusion and discord in the ACCA context. Indeed, the *Begay* majority expressed concern that without the extra-textual "purposeful, violent, and aggressive" limitation that it had fashioned, the ACCA's residual clause might have been read to apply to a host of other seemingly non-violent offenses, such as pollution and consumer-products offenses. See 553 U.S. at 146-147. The text of Section 16(b), by contrast, leaves no room for doubt about such offenses: *Leocal* unanimously construed Section 16(b)'s "emphasis on the use of physical force" to refer to "a category of violent, active crimes." 543 U.S. at 11. Pollution offenses and the like are plainly excluded.

c. Section 16(b) lacks a confusing list of exemplar crimes

Finally, Section 16(b) is not plagued by the same contradictory and opaque indications as the ACCA's residual clause on "how much risk" is necessary to satisfy the statute, because the phrase "substantial risk" is not preceded by a "confusing list of examples." *Johnson*, 135 S. Ct. at 2558, 2561. In illustrating the confusion generated by the residual clause's list of exemplar crimes, *Johnson* noted that "[t]he phrase 'shades of red,' standing alone, does not generate

confusion or unpredictability[,] but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *Id.* at 2561 (citation omitted). Section 16(b) is the equivalent of "shades of red," full stop.

That major textual difference avoids two of the central interpretive disputes spawned by the ACCA's residual clause. In this Court's first residual-clause case, *James*, the majority held that Florida's attempted-burglary offense qualified as a violent felony under the residual clause. 550 U.S. at 195. The majority reached that conclusion in part by comparing attempted burglary to its "closest analog" among the enumerated offense (burglary), *id.* at 203, and then determining that it "presents a risk that is comparable to the risk posed by the completed [burglary] offense," *id.* at 204. In his dissent for three Justices, Justice Scalia construed the residual clause to include only offenses at least as risky as what he viewed as the least risky enumerated offense (also burglary), *id.* at 224-225, and then determined that attempted burglary is categorically less risky than completed burglary, *id.* at 227. Those divergent approaches stemmed from the residual clause's ambiguity about the relationship between the risk posed by the exemplar crimes and the risk necessary to satisfy the residual clause.

The same ambiguity gave rise to another interpretive disagreement in *Begay*. The majority concluded that the residual clause's four enumerated offenses "illustrate the *kinds* of crimes that fall within the statute's scope," and it therefore construed the residual clause to cover only "crimes that are roughly similar, in *kind* as well as in degree of risk posed, to the

examples." 553 U.S. at 142-143 (emphases added). Justice Scalia and the dissenting Justices disagreed with that interpretation as well and would have focused exclusively on the risk levels posed by those offenses. See *id.* at 151 (Scalia, J., concurring in the judgment); *id.* at 158-159 (Alito, J., dissenting). The Court, moreover, later returned to a standard resting on "risk levels," effectively limiting the applicability of the *Begay* approach. *Sykes*, 564 U.S. at 13.

Section 16(b), by contrast, completely avoids the need to craft a legal test that takes account of "four examples [that] have little in common, most especially with respect to the level of risk of physical injury they pose." *James*, 550 U.S. at 229 (Scalia, J., dissenting). While Section 16(b) requires courts to apply a general risk standard categorically to the defined offense, it permits courts to apply a common understanding of what constitutes a "substantial risk" without having to interpret that phrase in an idiosyncratic way that accounts for the varying degrees of risk presented by exemplar crimes. And likewise, Section 16(b) does not require courts to determine any substantive similarities between a set of enumerated offenses and then compare those similarities to unenumerated offenses.

2. A statute is not unconstitutionally vague merely because it requires categorical consideration of a substantial risk of the use of force in the course of committing a defined offense

a. As discussed, Section 16(b), like the ACCA's residual clause, does require a court to apply a general risk standard to the ordinary case of an offense. But although the fact that the ACCA's residual clause called for an ordinary-case analysis was an important consideration in *Johnson*'s vagueness analysis, 135

S. Ct. at 2557-2558, it was not the only consideration. Rather, as discussed above, *Johnson* relied "[c]*ritically*" on the fact that the residual clause required "the judge to imagine how the idealized ordinary case of the crime *subsequently plays out*," *ibid.* (emphases added), and repeatedly underscored how the list of enumerated offenses engendered far greater uncertainty about the requisite level of risk than a general risk standard taken alone, see *id.* at 2558, 2559. As the Court carefully framed its holding, "[e]ach of the uncertainties in the residual clause may be tolerable in isolation"; it is "*their sum* [that] makes a task for us which at best could be only guesswork." *Id.* at 2560 (emphasis added; citation omitted). *Johnson* therefore does not suggest that any criminal statute requiring a categorical evaluation of the risk posed by an offense is unconstitutionally vague.

Nor would such a conclusion be consonant with first principles of due process. Although the fact that a statute has some clear applications at the extremes does not save it from facial invalidation for vagueness, see *Johnson*, 135 S. Ct. at 2560-2561, conversely a statute is not void for vagueness merely because "it may be difficult in some cases to determine whether [its] clear requirements have been met," or because it gives rise to close legal questions, *United States* v. *Williams*, 553 U.S. 285, 306 (2008). Rather, a criminal statute is unconstitutionally vague only if it "simply has *no* core." *Smith*, 415 U.S. at 578. Section 16(b) has a readily ascertainable core. Indeed, this Court has already unanimously identified burglary as the "classic example" of a Section 16(b) offense. *Leocal*, 543 U.S. at 10. And last Term in *Torres*, the majority and dissent each identified offenses falling under

Section 16, including some offenses that could only come under Section 16(b), indicating that the Court has not viewed the provision as "a black hole of confusion and uncertainty," *Johnson*, 135 S. Ct. at 2562. See *Torres*, 136 S. Ct. at 1629-1630 & n.10; *id.* at 1637 & n.1 (Sotomayor, J., dissenting). See also *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (treating as self-evident that kidnapping is a crime of violence under the materially identical definition at 18 U.S.C. 924(c)(3)(B)). And lower courts have not struggled to identify offenses that clearly fall within its compass. See pp. 45-52, *infra*.

As *Johnson* itself recognized, terms like "substantial risk" are not unconstitutionally vague, for the "law is full of instances" in which liability depends upon "some matter of degree." 135 S. Ct. at 2561 (citation omitted). If it were otherwise, numerous longstanding provisions of federal and state criminal law would be unconstitutional. See *ibid.* (acknowledging that "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'"); see also *id.* at 2577 (Alito, J., dissenting) ("There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99–page appendix setting out some of these laws."). A statute that predicates criminal liability or punishment on a general risk standard thus cannot be said to lack an "ascertainable standard" for that reason alone.

Nor is there anything inherently unworkable or arbitrary about applying such a general risk standard to a statutorily defined offense rather than to case-specific conduct. All assessments of the risks posed by past conduct, whether categorical or case-specific,

necessarily require consideration of events or courses of conduct that might have resulted from specified actions. For example, when a jury considers a child-endangerment charge, it must determine whether the defendant "act[ed] in a manner *likely* to be injurious to the physical, mental or moral welfare of a child," N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016) (emphasis added). That requires the jury to consider events that ordinarily might occur as a result of the defendant's actions—for example, whether a small child will ordinarily injure himself or suffer emotional harm if left alone for a long period of time. The same is true in predicting future risks. For example, in ruling on a motion for a preliminary injunction, a district court must decide whether the plaintiff is "*likely* to suffer irreparable harm in the absence of preliminary relief." *Winters* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). That necessarily requires the court to consider what sorts of injuries would ordinarily flow from the defendant's challenged conduct, including, for instance, predicting the behavior of third parties like customers and competitors. Accordingly, even case-specific risk assessments can require a factfinder to identify and evaluate the "ordinary case" of particular conduct.

Thus, whether a risk-focused statute is directed to case-specific conduct or a general category of behavior, it will necessarily require the decisionmaker to project and assess events or consequences that might flow from the specified conduct. Courts perform such risk assessments all the time, in an array of legal contexts. Nothing is fatally arbitrary or unprincipled, therefore, about the inquiry called for by Section 16(b): whether a given statutorily defined offense

"naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing [the] offense." *Leocal*, 543 U.S. at 10. And for the reasons discussed above, the distinctive textual limitations built into Section 16(b) ensure that it can be applied in a consistent and principled manner, unlike the far more open-ended and ill-defined standard set out in the ACCA's residual clause.

b. *Johnson* distinguished "apply[ing] an imprecise 'serious potential risk' standard to real-world facts" from the residual clause's demand to "apply [that standard] to a judge-imagined abstraction," 135 S. Ct. at 2558, thereby emphasizing that it was the combination of those two abstract elements that contributed to the residual clause's vagueness. It is clear that application of a general standard to a particular set of facts does not yield constitutional vagueness problems; to the contrary, application of a "qualitative standard" to "real-world conduct" is a typical feature of many statutes whose constitutionality *Johnson* "d[id] not doubt." *Id.* at 2561. But *Johnson*'s concerns about the residual clause must be understood in the context of the preceding discussion, where the Court explained that what made the residual clause so difficult to apply was that it "require[d] the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-2558. The "judge-imagined abstraction" was the entire universe of possible events that might flow from the commission of an offense and would give rise to a risk of physical injury. Section 16(b), by contrast, circumscribes the analysis to conduct undertaken by the offender in the course of committing the offense. See pp. 31-35, *supra*.

Moreover, categorical risk assessments can readily safeguard the values of fair notice and consistent enforcement that undergird the vagueness doctrine. Whether a particular offense categorically satisfies a particular risk standard is a legal question, subject to de novo appellate review, that must be answered the same way for all defendants or aliens. And novel questions under statutes like Section 16(b) can be answered with some degree of certainty through review of controlling judicial precedent. A properly tailored categorical risk standard, as in Section 16(b), is therefore not unconstitutionally vague.

3. Section 16(b) has not produced any interpretive confusion comparable to the ACCA's residual clause

a. In holding that Section 16(b) is unconstitutionally vague under *Johnson*, the Ninth Circuit disregarded not only the material textual differences between Section 16(b) and the ACCA's residual clause, but also the other critical factor in *Johnson*'s holding: the "failure of 'persistent efforts . . . to establish a standard'" for applying the ACCA's residual clause, which "provide[d] evidence of vagueness." 135 S. Ct. at 2558 (quoting *L. Cohen Grocery*, 255 U.S. at 91); see *id.* at 2558-2560; cf. *id.* at 2562-2563. *Johnson* placed significant weight on this "Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause" over the course of five cases. *Id.* at 2558. And the Court emphasized lower courts' frustration in attempting to apply this Court's residual-clause precedents. *Id.* at 2559-2560.

Section 16(b) bears no resemblance to the ACCA's residual clause in that respect. Despite the fact that Section 16(b) has a range of criminal and immigration

applications, this Court has never "fail[ed]" in an effort to construe it. And while *Johnson* explained that the ACCA's residual clause had "created numerous splits among the lower federal courts, where it has proved nearly impossible to apply consistently," 135 S. Ct. at 2560 (citation and internal quotation marks omitted), no comparable difficulties have arisen under Section 16(b). Given that this Court typically grants certiorari to resolve conflicts among lower courts over important and recurring questions of statutory interpretation, see Sup. Ct. R. 10(a), the fact that this Court has taken only a single Section 16(b) case in over 30 years is powerful evidence that it has not produced pervasive conflicts.

In the decision below, the Ninth Circuit gave no weight to the fact that Section 16(b) has not produced anything close to the same multitude of conflicting judicial decisions as the ACCA's residual clause, and thus has not prompted this Court to grant certiorari to resolve a conflict except in *Leocal*. Instead, the Ninth Circuit attributed the dearth of decisions to this Court's asserted preference for criminal cases over immigration cases. See Pet. App. 16a-17a & n.14.

That view is unfounded. In fact, this Court frequently grants certiorari to resolve circuit conflicts in immigration law; the Court heard four such cases in the last two Terms. See *Torres*, *supra*; *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015); *Kerry* v. *Din*, 135 S. Ct. 2128 (2015); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015). In any event, the Ninth Circuit overlooked that Section 16(b) is the *federal criminal code's* definition of "crime of violence," and it applies to numerous federal criminal statutes. See p. 53, *infra*. If Section 16(b), when not applied under the INA through 8 U.S.C.

1101(a)(43)(F), had produced the same level of conflict and confusion as the ACCA's residual clause, this Court likely would have considered more than one case concerning that provision since its enactment in 1984, or at least since its incorporation into the INA in 1990, see Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 501(a)(3), 104 Stat. 5048. This Court likewise has not had occasion to resolve a disputed question about the meaning of 18 U.S.C. 924(c)(3)(B), a definition of "crime of violence" that is worded in a materially identical manner in an important criminal provision. The most likely explanation for this Court's review of only a single case involving the Section 16(b) language in more than 30 years is that the language of Section 16(b) is clearer than that of the ACCA's residual clause.

b. Lower courts have disagreed on some questions arising under Section 16(b). But critically for the vagueness analysis, much of the case law on Section 16(b) has nothing to do with the "ordinary case" risk analysis—the aspect of Section 16(b) that purportedly gives rise to the vagueness problem. See notes 7-9, *infra*. Rather, lower courts have grappled with questions that would arise even if Section 16(b) called for a noncategorical analysis of the risk posed by real-world facts. Such legal issues do not support the contention that Section 16(b) suffers from the same constitutional infirmity as the ACCA's residual clause.

For example, *Leocal* left open whether recklessness offenses can qualify under Section 16(b). Lower courts have disagreed about that issue. Compare, *e.g.*, *Jimenez-Gonzalez* v. *Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008), with *Aguilar* v. *Attorney Gen. of the U.S.*, 663 F.3d 692, 696 (3d Cir. 2011). But this Court's

recent decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), clarified that, for purposes of a comparable statute, "reckless conduct indeed can constitute a crime of violence," *United States* v. *Benally*, No. 14-10452 (9th Cir. Nov. 7, 2016), slip op. 4—thus suggesting a resolution to that issue. And, more fundamentally, the question whether a recklessness offense could qualify would arise even if the statute focused on the particular facts of a defendant's offense rather than the ordinary case of the offense. It therefore does not amount to the sort of "evidence of vagueness" that *Johnson* found significant. 135 S. Ct. at 2558.

c. At the certiorari stage, respondent asserted (Br. in Opp. 26) that "[c]ircuit splits abound over whether particular offenses qualify under [Section 16(b)]." That assertion contradicts the assessment of courts of appeals that have considered whether the language of Section 16(b) is unconstitutionally vague. See *United States* v. *Hill*, 832 F.3d 135, 148 (2d Cir. 2016) ("[T]here is no such troubled interpretive history."); *United States* v. *Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016) (en banc) (ACCA's residual clause had "a record of unworkability not present here"), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016).

Respondent's brief in opposition cited only two purported circuit conflicts. The first—supposedly over whether unauthorized use of a motor vehicle qualifies under Section 16(b)—does not exist. Respondent overlooked that the Fifth Circuit overruled its pre-*Leocal* precedent in 2009 and held that unauthorized use of a motor vehicle is not a crime of violence under Section 16(b). See *United States* v. *Armendariz-Moreno*, 571 F.3d 490, 491 (2009) (per curiam).

The second purported conflict concerns burglary of an automobile, which the Fifth Circuit has correctly held qualifies as a crime of violence because of the risk that physical force will be used against property. See *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 784-785 (2012) (per curiam). Respondent cited two pre-*Leocal* precedents of the Seventh and Ninth Circuits as conflicting with that holding. The Seventh Circuit decision, however, appeared to rely on a misunderstanding about when the modified-categorical approach should be employed, as it remanded to the Board of Immigration Appeals to determine whether the particular conduct alleged in the charging papers bore the requisite risk. See *Solorzano-Patlan* v. *INS*, 207 F.3d 869, 875 (2000); see also *Descamps* v. *United States*, 133 S. Ct. 2276, 2281-2282 (2013) ("[C]ourts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements."). The Ninth Circuit decision relied on the fact that California automobile burglary "does not require an unprivileged or unlawful entry into the vehicle"—an element of the New Mexico offense considered by the Fifth Circuit in *Escudero-Arciniega*. *Sareang Ye* v. *INS*, 214 F.3d 1128, 1133-1134 (9th Cir. 2000); see *Escudero-Arciniega*, 702 F.3d at 784-785 (relying on the fact that the New Mexico "statute requires that the criminal lack authorization to enter the vehicle—a requirement alone which will most often ensure some force is used"). Those decisions hardly reflect the sort of widespread circuit disarray and methodological disagreements that could support the conclusion that a statute is fatally vague.

Respondent also asserted at the certiorari stage that a "leading immigration law treatise contains nine pages of small typeface text detailing the idiosyncratic and often conflicting conclusions that various courts have reached in applying § 16 to a range of state offenses." Br. in Opp. 26 (citing Ira J. Kurzban, *Immigration Law Sourcebook*, at 261-269 (15th ed. 2016) (Kurzban)). The cited treatise does not, however, demonstrate pervasive circuit conflicts on a par with the ACCA's residual clause. Much of the section addresses other legal questions arising under Section 16, such as what the phrase "term of imprisonment" means (pp. 260-261), whether recklessness crimes qualify after *Leocal* (pp. 261-262), how to determine under Section 16*(a)* whether the use of force is an element of the offense (pp. 262-263), and the use of the modified categorical approach for divisible statutes (p. 264). The existence of such interpretive issues does not distinguish Section 16 from any oft-invoked criminal or immigration statute.

The part of the treatise summarizing judicial decisions holding that particular offenses are not crimes of violence under Section 16 (pp. 267-269), moreover, lists relatively few decisions even applying the Section 16(b) categorical risk analysis to a particular offense—the aspect of that provision that assertedly raises vagueness concerns. Many of the cited circuit decisions instead rested on the court's threshold legal conclusion that a risk of the reckless use of force is not the kind of risk encompassed by the statute (see pp. 47-48, *supra*).[7] Others involved an offense that the

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[7] See *Villanueva* v. *Holder*, 784 F.3d 51, 54 (1st Cir. 2015); *Jimenez-Gonzalez*, 548 F.3d at 559-562; *Penuliar* v. *Mukasey*, 528 F.3d 603, 608-611 (9th Cir. 2008); *United States* v. *Torres-*

court held not to be a "felony" within the meaning of Section 16(b).[8] And many of the other cited decisions involved only Section 16(a) or other legal provisions that do not contain the Section 16(b) language.[9] The fact that the lion's share of the treatise's cited cases have nothing to do with Section 16(b)'s risk standard

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Villalobos, 487 F.3d 607, 613-617 (8th Cir. 2007); *Garcia* v. *Gonzales*, 455 F.3d 465, 467-469 (4th Cir. 2006); *Oyebanji* v. *Gonzales*, 418 F.3d 260, 263-265 (3d Cir. 2005) (Alito, J.); *Tran* v. *Gonzales*, 414 F.3d 464, 469-473 (3d Cir. 2005); *Bejarano-Urrutia* v. *Gonzales*, 413 F.3d 444, 445-447 (4th Cir. 2005); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372-376 (2d Cir. 2003); see also *Ramirez* v. *Lynch*, 810 F.3d 1127, 1133-1138 (9th Cir. 2016) (negligence offense); *Lara-Cazares* v. *Gonzales*, 408 F.3d 1217, 1219-1222 (9th Cir. 2005) (gross-negligence offense).

[8] *Ortega-Mendez* v. *Gonzales*, 450 F.3d 1010, 1014-1016 (9th Cir. 2006); *Popal* v. *Gonzales*, 416 F.3d 249, 254-255 (3d Cir. 2005).

[9] See *Whyte* v. *Lynch*, 807 F.3d 463, 466 (1st Cir. 2015); *United States* v. *Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014); *United States* v. *Gomez*, 757 F.3d 885, 902-903 (9th Cir. 2014); *United States* v. *Palomino Garcia*, 606 F.3d 1317, 1326 (11th Cir. 2010); *United States* v. *Becerril-Lopez*, 541 F.3d 881, 889-890 (9th Cir. 2008), cert. denied, 555 U.S. 1121 (2009); *Suazo Perez* v. *Mukasey*, 512 F.3d 1222, 1225 n.3 (9th Cir. 2008); *United States* v. *Narvaez-Gomez*, 489 F.3d 970, 975 (9th Cir. 2007); *United States* v. *Gomez-Guerra*, 485 F.3d 301, 303 (5th Cir.) (per curiam), cert. denied, 552 U.S. 865 (2007); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1125 n.6 (9th Cir. 2006) (en banc); *Singh* v. *Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006); *United States* v. *Bonilla-Mungia*, 422 F.3d 316, 319-320 (5th Cir.), cert. denied, 546 U.S. 1070 (2005); *United States* v. *Alfaro*, 408 F.3d 204, 207-208 (5th Cir.), cert. denied, 546 U.S. 911 (2005); *Szucz-Toldy* v. *Gonzales*, 100 F.3d 978, 982 (7th Cir. 2005) (per curiam); *Singh* v. *Ashcroft*, 386 F.3d 1228, 1231 & n.3 (9th Cir. 2004); *United States* v. *Calderon-Pena*, 383 F.3d 254, 256 (5th Cir. 2004), cert. denied, 543 U.S. 1076 (2005); *Flores* v. *Ashcroft*, 350 F.3d 666, 669 (7th Cir. 2003); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 191 (2d Cir. 2003).

provides compelling evidence that lower courts have not struggled in applying the statute.

d. It may well be that some circuit conflicts exist or will eventually arise over particular offenses that present close cases under the Section 16(b) risk standard, even after applying the rule of lenity to resolve ambiguities in favor of a narrow construction. See *Leocal*, 543 U.S. at 11-12 n.8. But it is a "basic mistake" to conclude that "the mere fact that close cases can be envisioned renders a statute vague," because "[c]lose cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-306. The constitutional question is whether Section 16(b) supplies a discernible standard capable of principled application—whether it has a "core." *Smith*, 415 U.S. at 578. For the reasons discussed above, its distinctive textual features refine and focus the statute's application in a manner that satisfies the Due Process Clause.

C. Invalidating Section 16(b) Would Have Deleterious Consequences For The Immigration Laws And The Federal Criminal Code

Section 16(b) has been part of the federal criminal code for over 30 years and has been incorporated into the INA's definition of "aggravated felony" since 1990. As discussed (p. 33, *supra*), the same statutory language appears in the definition of "crime of violence" in 18 U.S.C. 924(c). 18 U.S.C. 924(c)(3)(B). This Court has never suggested that the provision may pose constitutional problems. To the contrary, the Court unanimously construed the provision in *Leocal* with no suggestion that its language might be constitutionally problematic. 543 U.S. at 10-11. The Executive Branch has naturally relied on the validity of the

language in Section 16(b) in numerous criminal prosecutions and removal proceedings.

Invalidating that language now would have deleterious consequences for both criminal justice and immigration enforcement. Section 16 supplies the definition of "crime of violence" for many provisions in the federal criminal code, including provisions covering such areas as money laundering, racketeering, domestic violence, and crimes against children.[10] In addition, Section 924(c)'s materially identical definition is also incorporated into other criminal provisions. See 18 U.S.C. 844(*o*), 1028(b)(3)(B), 4042(b)(3)(B).[11] Accordingly, should this Court hold that Section 16(b) is unconstitutionally vague, many prisoners with long-final convictions could conceivably be eligible for col-

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[10] See 18 U.S.C. 25(a)(1), 119(b)(3), 931(a)(1), 1956(c)(7)(B)(ii), 3181(b)(1), 3663A(c)(1)(A)(i) (provisions expressly incorporating Section 16); see also 18 U.S.C. 842(p)(2), 929(a)(1), 1039(e)(1), 1952(a), 1959(a)(4), 2250(d), 2261(a), 3142(f), 3559(f), 3561(b) (provisions using term "crime of violence"); 18 U.S.C. 2261 (2012 & Supp. II 2014) (same).

[11] If this Court were to hold that Section 16(b) is unconstitutional as applied through the INA's definition of "aggravated felony," Section 924(c) might be distinguished on the ground that conviction under that provision requires a specified nexus to the use, carrying, or possession of a firearm. That nexus requirement clarifies that certain predicate offenses that might present close questions under Section 16(b) could not support Section 924(c) liability because they could not be committed with the requisite nexus to a firearm. The nexus requirement therefore might serve to narrow the scope of the statute and eliminate vagueness concerns. For that reason, should this Court hold that Section 16(b) is unconstitutionally vague as applied in immigration proceedings through the INA's definition of "aggravated felony," it should reserve the question whether Section 924(c)(3)(B) is constitutionally invalid.

lateral relief, cf. *Welch* v. *United States*, 136 S. Ct. 1257 (2016), despite the fact that until *Johnson* was decided in 2015, no appellate court had even suggested that Section 16(b) is unconstitutionally vague.

Similarly, the invalidation of part of the INA's definition of "aggravated felony" would affect numerous provisions of the immigration laws. Under the INA's highly reticulated scheme, an alien's conviction for an "aggravated felony" triggers a series of legal consequences. Such a conviction renders an admitted alien deportable, 8 U.S.C. 1227(a)(2)(A)(iii); bars many forms of discretionary relief from removal, including asylum, cancellation of removal, and voluntary departure, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(C)[12]; subjects an alien to mandatory detention during removal proceedings, see 8 U.S.C. 1226(c); authorizes an abbreviated removal procedure for non-LPRs, 8 U.S.C. 1228(b); and precludes some aliens from qualifying for naturalization, see 8 U.S.C. 1101(f)(8), 1427(a)(3). If Section 16(b) were held invalid, criminal aliens who have committed Section 16(b) crimes of violence could evade those congressionally mandated restrictions, which are designed to ensure that dangerous criminal aliens are removed from the United States.

Of particular concern, many of the predicate offenses that have been held to fall under that provision are quite serious. For example, the Ninth Circuit itself has held the offenses of lewd and lascivious acts on a child, sexual penetration by a foreign object, sexual battery, kidnapping, and false imprisonment qualify as aggravated felonies by virtue of Section

---

[12] See note 4, *supra*.

16(b).[13] Congress made the sensible judgment that such aliens should be removed from the country straightaway and without the possibility of discretionary relief.

Further, invalidating Section 16(b) may reduce the reach of an important tool for removing domestic abusers from the United States. Under 8 U.S.C. 1227(a)(2)(E)(i), an alien who has committed a Section 16 "crime of violence" against a person who stands in a specified domestic relationship with the alien is removable, regardless of the length of the sentence for the offense. Holding Section 16(b) unconstitutionally vague as incorporated into the INA's definition of "aggravated felony" would throw into serious question whether DHS may invoke that provision where the predicate crime falls within Section 16(b).

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[13] See *Rodriguez-Castellon* v. *Holder*, 733 F.3d 847, 856 (2013), cert. denied, 135 S. Ct. 355 (2014); *United States* v. *Sandoval-Orellana*, 714 F.3d 1174, 1177 (2013); *Lisbey* v. *Gonzales*, 420 F.3d 930, 931-934 (2005), cert. denied, 549 U.S. 868 (2006); *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125, 1126 (2012) (per curiam); *Barragan-Lopez* v. *Holder*, 705 F.3d 1112, 1114-1116 (2013).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

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[1] So in original. Probably should be preceded by "is".

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[1] least one year;

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens.

(a) Classes of deportable aliens

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * * * *

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the

term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

6. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For the purposes of this subsection, the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

* * * * *

RECORDS AND BRIEFS

No. 15-1498

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

JAMES GARCIA DIMAYA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The Armed Career Criminal Act's (ACCA) "residual clause" defined a "violent felony" as a felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). In *Johnson v. United States*, this Court held that provision void for vagueness because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," which yields unpredictable and arbitrary results. 135 S. Ct. 2551, 2557-58 (2015). This case involves another criminal statute, 18 U.S.C. § 16, with an almost identical residual clause presenting the same problems: It defines a "crime of violence" as a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Although the Government poses only one question explicitly, its brief presents two:

1. Whether the residual clause contained in 18 U.S.C. § 16 is unconstitutionally vague under *Johnson*.

2. Whether *Jordan v. De George*, 341 U.S. 223 (1951), should be overruled, such that *Johnson*'s void-for-vagueness analysis would not apply to 18 U.S.C. § 16 in this immigration case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. The § 16 Residual Clause Is Unconstitutionally Vague Under *Johnson*. 12

A. The § 16 residual clause shares the two features that led this Court to strike the ACCA residual clause. 12

1. The § 16 residual clause makes no more clear what the "ordinary case" of a crime involves. 14

2. The § 16 residual clause makes no more clear how to measure the "risk" a hypothetical offense poses. 17

B. The Government's revised position on the § 16 residual clause lacks merit. 20

1. The phrase, "in the course of committing the offense," does not provide any more clarity 21

2. "Physical force" is at least as vague as "physical injury." 25

3. Section 16's lack of exemplar offenses makes it vaguer. 28

C. The § 16 residual clause has generated substantial confusion. 30

II. *Johnson*'s Vagueness Analysis Applies Equally In The Deportation Context. 38

A. *Jordan* held that the standard vagueness analysis applies to deportation statutes. 39

B. This Court should not consider overruling *Jordan* in a case involving a statute with criminal applications. 41

C. *Jordan* Was Correctly Decided. 44

1. Deportation laws are punitive and carry severe consequences. 44

2. The ordinary vagueness analysis governs civil statutes imposing severe consequences. 46

3. Deportation statutes implicate concerns about fair notice and arbitrary enforcement. 51

III. The Government Overstates The Effect Of Invalidating The § 16 Residual Clause As It Applies To Prior Convictions. 56

CONCLUSION 60

STATUTORY APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

A.B. Small Co. v. Am. Sugar Refin. Co.,
267 U.S. 233 (1925).....42, 47, 48

Addo v. Mukasey,
555 U.S. 1132 (2009).....36

Aguiar v. Gonzales,
438 F.3d 86 (1st Cir. 2006).....32

Aguilar v. Attorney Gen.,
663 F.3d 692 (3d Cir. 2011).....26

Armendariz-Moreno v. United States,
555 U.S. 1133 (2009).....36

Baptiste v. Attorney Gen.,
841 F.3d 601 (3d Cir. 2016).....9, 16, 23, 34, 41

Begay v. United States,
553 U.S. 137 (2008).....27, 28, 29

Beslic v. INS,
265 F.3d 568 (7th Cir. 2001).....40, 52

Benslimane v. Gonzales,
430 F.3d 828 (7th Cir. 2005).....54

Boutilier v. INS,
387 U.S. 118 (1967).....52

Bridges v. Wixon,
326 U.S. 135 (1945) 50

Carachuri-Rosendo v. Holder,
560 U.S. 563 (2010) 54

Castillo-Lucio v. United States,
555 U.S. 1133 (2009) 36

Chaidez v. United States,
133 S. Ct. 1103 (2013) 52

Chambers v. United States,
555 U.S. 122 (2009) 18, 37

Chery v. Ashcroft,
347 F.3d 404 (2d Cir. 2003) 32

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 49

Clark v. Martinez,
543 U.S. 371 (2005) 43

Connally v. Gen. Constr. Co.,
269 U.S. 385 (1926) 39, 48

De La Paz Sanchez v. Gonzales,
473 F.3d 133 (5th Cir. 2006) 33

Demore v. Kim,
538 U.S. 510 (2003) 44

Derby v. United States,
131 S. Ct. 2858 (2011) 35

Descamps v. United States,
133 S. Ct. 2276 (2013).....5, 6, 15, 57

Dixon v. Attorney Gen.,
768 F.3d 1339 (11th Cir. 2014).....32, 33

In re Edward Octavius Musman,
2010 WL 2224555 (BIA May 7, 2010).....54

Escudero-Arciniega v. Holder,
702 F.3d 781 (5th Cir. 2012).....31

FCC v. Am. Broad. Corp.,
347 U.S. 284 (1954).....43

Fernandez-Ruiz v. Gonzales,
466 F.3d 1121 (9th Cir. 2006).....27

Fiswick v. United States,
329 U.S. 211 (1946).....45

Flores v. Ashcroft,
350 F.3d 666 (7th Cir. 2003).....26

Flores-Lopez v. Holder,
685 F.3d 857 (9th Cir. 2012).....33

Fong Haw Tan v. Phelan,
333 U.S. 6 (1948).....39, 45

In re Francisco-Alonzo,
26 I. & N. Dec. 594 (BIA 2015).....37

Galvan v. Press,
347 U.S. 522 (1954).....53

Giaccio v. Pennsylvania,
382 U.S. 399 (1966) 46, 48

Golicov v. Lynch,
837 F.3d 1065 (10th Cir. 2016) 8, 40, 41

Grayned v. City of Rockford,
408 U.S. 104 (1972) 46

H.J. Inc. v. Nw. Bell Tel. Co.,
492 U.S. 229 (1989) 42

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 53

Henry v. Bureau of Immigration & Customs Enf't,
493 F.3d 303 (3d Cir. 2007) 23, 24

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 53

INS v. St. Cyr,
533 U.S. 289 (2001) 53

James v. United States,
550 U.S. 192 (2007) 14, 28, 29

Jimenez-Gonzalez v. Mukasey,
548 F.3d 557 (7th Cir. 2008) 26, 37

Johnson v. United States,
135 S. Ct. 2551 (2015) ..... *passim*

Johnson v. United States,
559 U.S. 133 (2010) 25, 26

Jordan v. De George,
341 U.S. 223 (1951).....i, 2, 8, 38, 40, 45, 51

Judulang v. Holder,
132 S. Ct. 476 (2011).....54

Karimi v. Holder,
715 F.3d 561 (4th Cir. 2013).....26

Kolender v. Lawson,
461 U.S. 352 (1983).....47, 53, 55

Kolstad v. Am. Dental Ass'n,
527 U.S. 526 (1999).....40

Lanzetta v. New Jersey,
306 U.S. 451 (1939).....48

Leocal v. Ashcroft,
543 U.S. 1 (2004).....4, 16, 19, 22, 27, 28, 43

Lopez-Cardona v. Holder,
662 F.3d 1110 (9th Cir. 2011).....23

Mahler v. Eby,
264 U.S. 32 (1924).....49, 50

Marcello v. Bonds,
349 U.S. 302 (1955).....53

Martinez v. United States,
135 S. Ct. 2939 (2015).....37

Mellouli v. Lynch,
135 S. Ct. 1980 (2015).....51, 57

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013).....3, 4, 16, 57, 59

Ng v. Attorney Gen.,
436 F.3d 392 (3d Cir. 2006).....22

Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.,
299 U.S. 183 (1936).....48

Ornelas v. United States,
517 U.S. 690 (1996).....40

Padilla v. Kentucky,
559 U.S. 356 (2010).....40, 45, 51, 52

Penuliar v. Mukasey,
528 F.3d 603 (9th Cir. 2008).....37

People v. Little,
206 Cal. App. 4th 1364 (2012).....15

People v. Nguyen,
40 Cal. App. 4th 28 (1995).....15

People v. Saint-Amans,
131 Cal. App. 4th 1076 (2005).....15

People v. Salemme,
2 Cal. App. 4th 775 (1992).....15

Prakash v. Holder,
579 F.3d 1033 (9th Cir. 2009).....22

Reyes-Figueroa v. United States,
555 U.S. 1132 (2009).....36

Santana v. Holder,
714 F.3d 140 (2d Cir. 2013) 26

Sareang Ye v. INS,
214 F.3d 1128 (9th Cir. 2000).....31

Serna-Guerra v. Holder,
556 U.S. 1279 (2009).....36

Shuti v. Lynch,
828 F.3d 440 (6th Cir. 2016).....8, 29, 40, 58

Singh v. Ashcroft,
386 F.3d 1228 (9th Cir. 2004).....26

Sykes v. United States,
564 U.S. 1 (2011).....18. 36

Taylor v. United States,
495 U.S. 575 (1990).....19, 27

Texas v. Johnson,
491 U.S. 397 (1989).....13

Torres v. Lynch,
136 S. Ct. 1619 (2016).....36

United States v. Aragon,
983 F.2d 1306 (4th Cir. 1993).....22

United States v. Armendariz-Moreno,
571 F.3d 490 (5th Cir. 2009).....33

United States v. Becker,
919 F.2d 568 (9th Cir. 1990).....6, 23

United States v. Cardena,
Nos. 12-3680, 12-3683, 12-3747, 13-1374 & 13-2321, 2016 WL 6819696 (7th Cir. Nov. 18, 2016) 58

United States v. Castleman,
134 S. Ct. 1405 (2014).....26, 27

United States v. Daye,
571 F.3d 225 (2d Cir. 2009) 37

United States v. Eichman,
496 U.S. 310 (1990).....13

United States v. Enriques,
No. 8:08CR383, 2016 WL 4273187 (D. Neb. Aug. 12, 2016).....58

United States v. Evans,
333 U.S. 483 (1948).....38

United States v. Fish,
758 F.3d 1 (1st Cir. 2014) 17

United States v. Gonzalez-Longoria,
831 F.3d 670 (5th Cir. 2016).....8, 21

United States v. Guzman-Landeros,
207 F.3d 1034 (8th Cir. 2000).....31

United States v. Hill,
832 F.3d 135 (2d Cir. 2016) 58

United States v. Hull,
456 F.3d 133 (3d Cir. 2006) 27

United States v. L. Cohen Grocery Co.,
255 U.S. 81 (1921).....42, 48

United States v. Lanier,
520 U.S. 259 (1997).....43

United States v. Martinez,
771 F.3d 672 (9th Cir. 2014).....37

United States v. Matchett,
837 F.3d 1118 (11th Cir. 2016).....50

United States v. Mayer,
560 F.3d 948 (9th Cir. 2009).....16

United States v. McDaniels,
147 F. Supp. 3d 427 (E.D. Va. 2015).....58

United States v. Mincks,
409 F.3d 898 (8th Cir. 2005).....37

United States v. Portela,
469 F.3d 496 (6th Cir. 2006).....27

United States v. Prickett,
839 F.3d 697 (8th Cir. 2016).....58

United States v. Sanchez-Espinal,
762 F.3d 425 (5th Cir. 2014).....26

United States v. Serafin,
562 F.3d 1105 (10th Cir. 2009).....34

United States v. Velazquez-Overa,
100 F.3d 418 (5th Cir. 1996).....32

United States v. Vivas-Ceja,
808 F.3d 719 (7th Cir. 2015).....8. 41

United States v. Zuniga-Soto,
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439 F.3d 1046 (9th Cir. 2006).....32

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448 F.3d 159 (2d Cir. 2006) 34

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132 S. Ct. 1479 (2012).....53

Village of Hoffman Estates v. The Flipside,
455 U.S. 489 (1982).....46, 47, 49

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136 S. Ct. 2272 (2016).....25, 27

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136 S. Ct. 1257 (2016).....13, 20, 21, 30

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807 F.3d 463 (1st Cir. 2015) 26

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333 U.S. 507 (1948).....49

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173 F.3d 601 (7th Cir. 1999).....32

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533 U.S. 678 (2001) 54

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8 U.S.C. § 1101(a)(43)(B) 3, 59

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8 U.S.C. § 1101(a)(43)(G) 3, 6, 59

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8 U.S.C. § 1227(a) 2

8 U.S.C. § 1227(a)(2) 59

8 U.S.C. § 1227(a)(2)(A)(ii) 3

8 U.S.C. § 1227(a)(2)(A)(iii) 3, 4, 5, 38, 42

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8 U.S.C. § 1229b.....3

8 U.S.C. § 1229b(a)(3).....3, 5

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8 U.S.C. § 1326(a) 3

8 U.S.C. § 1326(b)(2).....3, 5, 41, 42

8 U.S.C. § 1326(d) 42

8 U.S.C. § 1327.....42

18 U.S.C. § 16.....*passim*

18 U.S.C. § 16(a).....25, 58

18 U.S.C. § 16(b).....5, 8

18 U.S.C. § 25(b).....56

18 U.S.C. § 922(g)(9) 26

18 U.S.C. § 924(c) 57, 58

18 U.S.C. § 924(c)(3)(B).....57, 58

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INTRODUCTION

In *Johnson v. United States*, the Government cautioned this Court that if it were to strike the ACCA residual clause as unconstitutionally vague, the § 16 residual clause would be "equally susceptible" to challenge. Supp. Br. for the United States at 22, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120) ("Gov't *Johnson* Br."). As the Government correctly explained then, "[l]ike the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." *Id.* at 22-23. This Court ultimately concluded that those "[t]wo features" were what "conspire[d] to make [the ACCA residual clause] unconstitutionally vague." *Johnson*, 135 S. Ct. at 2557. That means that the § 16 residual clause is invalid as well.

The Government now flips positions. It still acknowledges that the § 16 residual clause shares those two key features. It just seizes on a few trivial differences to argue that § 16's residual clause is not "equally susceptible" to *Johnson*'s holding after all. Those distinctions do not withstand scrutiny. If anything, they make this residual clause vaguer. Certainly, the lower courts find it no clearer: They are struggling to give meaning to § 16's residual clause every bit as much as they struggled with the ACCA's.

The Government also argues that even if the clauses are equally vague, the result should be different here because this is a deportation case rather than a criminal case. That argument contradicts nearly a

century of this Court's precedent holding that the vagueness standard from criminal cases applies to civil statutes imposing severe consequences—including deportation statutes. Due process requires fair notice of which crimes will trigger removal "in view of the grave nature of deportation." *Jordan v. De George*, 341 U.S. 223, 231 (1951). All the more so here, because § 16's consequences include virtually certain deportation, up to 20 years in prison for any attempt to reenter the country, and banishment *for life*—a fate far worse than many criminal penalties.

In the end, the Government seeks to deport a lawful permanent resident based on his conviction for California's extraordinarily broad "burglary" crime because an imagined "ordinary case" of that offense involves some high-enough risk of physical force. That analysis is far too arbitrary to permit the Government to exile him forever from the only country he has known since he was 13. The judgment should be affirmed.

STATUTORY PROVISIONS INVOLVED

The Government's statutory appendix omits certain statutory provisions important for context. Accordingly, we reproduce the relevant statutes in the appendix to this brief.

STATEMENT OF THE CASE

1. The Immigration and Nationality Act (INA) authorizes the Attorney General to remove several classes of "deportable" noncitizens. 8 U.S.C. § 1227(a). Those who have been convicted of "two or more crimes

involving moral turpitude," for example, are deportable, even if they are lawful permanent residents. § 1227(a)(2)(A)(ii). Lawful permanent residents in this class "may ask the Attorney General for certain forms of discretionary relief from removal, like asylum ... and cancellation of removal." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013) (citing §§ 1158, 1229b).

This case involves another class, comprising noncitizens who are "convicted of an aggravated felony." § 1227(a)(2)(A)(iii). Noncitizens in this class, including lawful permanent residents, are generally ineligible for discretionary relief from removal. *See Moncrieffe*, 133 S. Ct. at 1682 (citing § 1158(b)(2)(A)(ii), (B)(i); § 1229b(a)(3), (b)(1)(C)). For them, deportation is "a virtual certainty." Pet. App. 6a (quotation marks omitted).

The "aggravated felony" designation also carries other harsh consequences. Whereas noncitizens who have been deported are ordinarily barred from the United States for 10 years, aggravated felons are banished for life. § 1182(a)(9)(A)(ii). And while individuals who reenter the country illegally after deportation can be imprisoned for up to two years, the penalty spikes tenfold—to 20 years—for anyone deported following an aggravated felony conviction. § 1326(a), (b)(2).

The INA supplies a long list of offenses that qualify as "aggravated felonies." § 1101(a)(43). It includes felonies as diverse as "theft," "burglary," "drug trafficking," "forgery," and "obstruction of justice." § 1101(a)(43)(B), (G), (R), (S). Central to this case is a

clause that defines "aggravated felony" to include "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F).

The definition of "aggravated felony" thus incorporates by reference 18 U.S.C. § 16, which supplies the federal criminal code's general definition of a "crime of violence." The definition has two parts. The so-called "elements clause" covers:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

The "residual clause" covers:

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

This Court has prescribed a formal analytical protocol where, as here, a statute "asks what offense the noncitizen was 'convicted' of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed": Courts "employ a 'categorical approach' to determine whether [a] state offense," when "viewed in the abstract," fits within the "federal definition of a corresponding aggravated felony." *Moncrieffe*, 133 S. Ct. at 1684-85; *see Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (noting that "the 'offense' of conviction" under

the § 16 residual clause is examined under the categorical approach); *see also Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (same under the ACCA). For catchall descriptions tied to a measure of "risk," like the § 16 residual clause, the categorical approach "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" the requisite risk of harm. *Johnson*, 135 S. Ct. at 2557.

When the intertwined immigration and criminal statutes are combined, then, federal law dictates four penalties for a noncitizen who is "convicted of" a crime whose ordinary case "involves a substantial risk that physical force" will be used, 18 U.S.C. § 16(b): He "is deportable," 8 U.S.C. § 1227(a)(2)(A)(iii); ineligible for cancellation of removal or asylum, § 1158(b)(2)(A)(ii), (B)(i), § 1229b(a)(3), (b)(1)(C); barred from returning "at any time," § 1182(a)(9)(A)(ii); and subject to greatly enhanced punishment if he nevertheless returns, § 1326(b)(2).

2. James Garcia Dimaya was admitted to the United States as a lawful permanent resident in 1992, when he was 13 years old. Pet. App. 42a; Certified Administrative Record (C.A.R.) 161. He attended high school in California while living with family, obtained his G.E.D., and attended community college. C.A.R. 161, 169-70. Since then, he has worked in several positions, including as a cashier and a store manager. C.A.R. 170.

In 2007 and 2009, Dimaya pleaded no contest to charges of residential "burglary" under California Penal Code §§ 459 and 460(a). Pet. App. 42a. In 2010,

the Government placed him in removal proceedings. *Id.*

3. The Government alleged that Dimaya's convictions made him deportable because each was (1) a crime involving moral turpitude, (2) a generic "theft or burglary offense" within the meaning of § 1101(a)(43)(G), and (3) a "crime of violence" under § 16's residual clause. Pet. App. 42a-43a. An immigration judge held that Dimaya was deportable on all three independent grounds. Pet. App. 43a. As to the crime of violence determination, the judge emphasized that each conviction entailed the "unlawful entry into a residence," Pet. App. 54a, an act that would "risk[] surprise upon an inhabitant," C.A.R. 148. That finding was premised on factual allegations of "unlawful entry" in the charging documents in Dimaya's record of conviction. *See* Pet. App. 51a; C.A.R. 148. The immigration judge also relied on a Ninth Circuit decision holding that burglary under § 459 constitutes a crime of violence. Pet. App. 54a (citing *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990)).

The Board of Immigration Appeals denied Dimaya's appeal. Pet. App. 41a-48a. The Board first decided that Dimaya's California burglary offenses did not satisfy the federal definition of "burglary offense" because that unique statute lacks the element of unlawful entry, Pet. App. 45a, as this Court later held in *Descamps*, 133 S. Ct. at 2285-86. But the Board then concluded that the 2007 conviction was nonetheless an aggravated felony because, under *Becker*, it constituted a crime of violence under the § 16 residual clause. Pet. App. 45a-48a. The Board

therefore did not reach the question whether Dimaya's burglary convictions involved moral turpitude. *See* Pet. App. 47a.

4. Dimaya petitioned for review in the Ninth Circuit. While the case was pending, this Court ordered supplemental briefing in *Johnson* on whether the ACCA residual clause is unconstitutionally vague. In light of the similarity between the residual clauses in ACCA and § 16, the Court of Appeals held this case pending *Johnson*. This Court ultimately struck the ACCA residual clause as void for vagueness.

Following *Johnson*, the Court of Appeals concluded that the § 16 residual clause "suffers from the same indeterminacy as [the] ACCA's residual clause." Pet. App. 2a. The court therefore struck the § 16 residual clause as unconstitutionally vague as applied to the analysis of prior convictions in immigration proceedings. Pet. App. 2a, 20a n.17.

The Court of Appeals emphasized that the language of the § 16 residual clause is "similar" to the ACCA residual clause and compels "the same mode of analysis." Pet. App. 8a. Like the ACCA residual clause, the § 16 residual clause requires a court to measure the risk of a harm that is presented by the "ordinary case" of a crime. Pet. App. 9a. And the requisite degree of risk is no more precise: Where the ACCA residual clause required a "serious potential risk of physical injury," § 16 requires a "substantial risk" that "physical force" may be "used" in the course of committing the offense. Pet. App. 8a, 12a-13a.

The court therefore concluded that, like the ACCA residual clause, "§ 16(b)'s definition of a crime of violence[] combines 'indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as' a crime of violence." Pet. App. 13a-14a (quoting *Johnson*, 135 S. Ct. at 2558). The Court of Appeals also noted that, "'in view of the grave nature of deportation,'" this Court has applied the void-for-vagueness doctrine to deportation laws. Pet. App. 5a (quoting *Jordan*, 341 U.S. at 231). Accordingly, the court held that the § 16 residual clause is unconstitutionally vague under *Johnson*, and remanded the case so that the Board could consider the remaining question whether the convictions are crimes involving moral turpitude. Pet. App. 2a n.1, 20a.

Judge Callahan dissented, embracing several of the arguments the Government advances here. Pet. App. 20a-40a.

5. Unanimous panels of the Sixth, Seventh, and Tenth Circuits then joined the decision below in declaring the § 16 residual clause unconstitutionally vague under *Johnson*. *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015). Sitting en banc, a divided Fifth Circuit disagreed, over Judge Jolly's dissent (joined by three other judges) arguing that the ACCA and § 16 residual clauses, "in constitutional essence, say the same thing." *United States v. Gonzalez-Longoria*, 831 F.3d 670, 686 (5th Cir. 2016) (en banc) (Jolly, J., dissenting). After this Court granted certiorari in this case, the Third Circuit rejected the Fifth Circuit's

view, *Baptiste v. Attorney Gen.*, 841 F.3d 601 (3d Cir. 2016), for a 5-1 split in favor of finding the § 16 residual clause unconstitutionally vague.

SUMMARY OF ARGUMENT

I. A. *Johnson* invalidated the ACCA's residual clause because it combined "[t]wo features" that "conspire[d] to make it unconstitutionally vague." The § 16 residual clause shares both of these features, as the Government concedes. It too requires that courts examine prior convictions by conjuring up the "ordinary case" of an offense, rather than looking to the individual's actual conduct. And it too requires that courts assess whether that hypothetical offense poses an undefined risk of harm. Just as the ACCA residual clause failed to tell courts how to decide what the "ordinary case" of a crime involves or how to measure the risk it poses, the § 16 residual clause fails as well.

B. The Government nevertheless contends that a few minor differences between the two provisions should save the § 16 residual clause. But those distinctions do not mitigate the vagueness, and, if anything, make the § 16 residual clause vaguer. The Government says, for example, that the § 16 residual clause has a "temporal restriction" that avoids any need to consider risks arising *after* the completion of an imagined offense. But that is not how courts (or the Government itself) apply § 16, which is why inchoate offenses like solicitation and conspiracy, and certain firearms-possession offenses, have all been deemed crimes of violence. Indeed, the Ninth Circuit designated California burglary a crime of violence only by

considering events that might transpire after the offense itself—*entering* with intent to commit a crime—is complete.

Nor is it meaningful that the § 16 residual clause focuses on the risk of "force," whereas the ACCA residual clause addresses the risk of "injury." This Court uses those terms interchangeably. And there is no distinction between them that makes it easier to ascertain what amount of harm an "ordinary case" poses. If anything, "force" is *more* vague: This Court has repeatedly wrestled with what constitutes the "use of force," and it is hard to measure the *risk* of the use of force when it is hard to define "use of force" in the first place.

Similarly, § 16's lack of exemplar offenses only leaves the analysis more untethered than it was under the ACCA. The § 16 residual clause applies to an even more open-ended set of offenses.

C. The § 16 residual clause has sparked several conflicts among the courts of appeals. The statute is litigated less frequently than the ACCA residual clause was because it arises most commonly in immigration cases, where there are many more alternative grounds for deportation and where noncitizens have no right to appointed counsel. But when the lurking circuit splits on, for example, car burglary and evading arrest do reach this Court, the analysis will be just as mystifying as it was with the ACCA.

II. *Johnson*'s vagueness analysis applies here. As this Court recognized in *Jordan*, "the established criteria of the 'void for vagueness' doctrine" apply to

deportation statutes in "view of the grave nature of deportation." In the decades since, this Court has only further emphasized that deportation is a key part of the penalty for noncitizens convicted of crimes. And this Court has repeatedly held that the same concerns about fair notice and arbitrary enforcement apply to the immigration consequences of criminal convictions as well.

Jordan is thus consistent with this Court's cases demonstrating that contemporary vagueness standards in criminal cases apply to civil statutes that impose similarly severe consequences (unlike pure economic regulations). The established vagueness standard itself has evolved over time, and the old cases the Government cites reflect those changes. But throughout, this Court has repeatedly declined to draw a sharp line between civil and criminal statutes. It should not start now, and especially not here: The § 16 residual clause *is* a criminal statute, even as incorporated into the INA, because a prior "aggravated felony" conviction is an element of the INA's illegal-reentry offense that carries a sentence of up to 20 years.

III. The Government overstates the effect of invalidating the § 16 residual clause as it applies to past convictions. The Government cites several statutes that reference § 16 or use similar language. But most of them may never raise the vagueness question presented here, because those statutes characterize the offense for which a defendant is currently being prosecuted, not a prior conviction. Accordingly, several courts have declined to apply the categorical "ordinary case" approach—a critical component of the

ambiguity under *Johnson*—to such statutes. This Court need not resolve that threshold question here.

This case will also have a minimal impact on immigration enforcement. Section 16 is one of only 80 enumerated crimes that define an "aggravated felony." Still more crimes beyond those "aggravated" ones can lead to deportation. Striking the § 16 residual clause will therefore have a limited effect on the Government's ability to deport lawful permanent residents like Dimaya.

ARGUMENT

I. The § 16 Residual Clause Is Unconstitutionally Vague Under *Johnson*.

A. The § 16 residual clause shares the two features that led this Court to strike the ACCA residual clause.

In *Johnson*, this Court considered the ACCA's residual clause, which defined "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year ... that ... is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*[.]" 18 U.S.C. § 924(e)(2)(B) (emphasis added). This Court concluded that "the indeterminacy of the wide-ranging inquiry required by the [ACCA's] residual clause both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S. Ct. at 2557.

"Two features" of the ACCA residual clause "conspire[d] to make it unconstitutionally vague." *Id.* First, the clause required an inherently uncertain determination under the categorical approach of "what kind of conduct the 'ordinary case' of a crime involves," rather than any analysis of "real-world facts." Second, that "judge-imagined abstraction" then had to be assessed under "an imprecise 'serious potential risk' standard." *Id.* at 2557-58; *see Welch v. United States*, 136 S. Ct. 1257, 1262 (2016).

These were the same two key features the Government noted in *Johnson* when it warned that the § 16 residual clause "is equally susceptible to petitioner's central objection to the [ACCA] residual clause": Both statutes require an assessment of "the risk of confrontations and other violent encounters" posed by a judicially imagined "ordinary case" of a given offense. Gov't *Johnson* Br. 22-23.

While the Government has changed its conclusion, it still does not dispute the premise. It concedes "that Section 16(b), like the ACCA's residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense." Gov't Br. 11. "But," it now protests, "the similarity ends there." *Id.* That is like saying a federal ban on flag burning resembles an unconstitutional Texas one because it also suppresses expressive conduct, "but the similarity ends there." Sure, but the similarity need go no further. *See United States v. Eichman*, 496 U.S. 310, 315-19 (1990) (declining to distinguish *Texas v. Johnson*, 491 U.S. 397 (1989)). Because the § 16 residual clause likewise "combin[es] indeterminacy about how to measure the risk posed by a crime with indeterminacy about how

much risk it takes for the crime to qualify," it too "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558.

1. The § 16 residual clause makes no more clear what the "ordinary case" of a crime involves.

As to the ACCA residual clause's "ordinary case" inquiry, *Johnson* could find no answer to the question, "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves?" 135 S. Ct. at 2557. This Court used attempted burglary to illustrate the ambiguity: Does the "ordinary case" of attempted burglary involve circumstances where "[a]n armed would-be burglar [is] spotted by a police officer, a private security guard, or a participant in a neighborhood watch program"? *Id.* at 2558 (quoting *James v. United States*, 550 U.S. 192, 211 (2007)). Or does it involve circumstances where "a homeowner ... give[s] chase, and a violent encounter ... ensue[s]"? *Id.* (quoting *James*, 550 U.S. at 211). Or, alternatively, does it involve "nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away"? *Id.* (quoting *James*, 550 U.S. at 226 (Scalia, J., dissenting)). Because "[t]he [ACCA] residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves," it was unconstitutionally vague. *Id.*

Those same questions are just as unanswerable under the § 16 residual clause. Dimaya's conviction illustrates the challenge. California's peculiar burglary

provision criminalizes simply "entering" certain structures "with intent to commit ... larceny or any felony." Cal. Penal Code § 459. As this Court recognized in *Descamps*, California burglary bears little resemblance to traditional burglary. "[B]urglary statutes generally demand breaking and entering or similar conduct," but California's does not. *Descamps*, 133 S. Ct. at 2282. Rather, the California statute "sweep[s] so widely" that it encompasses "a shoplifter['s] enter[ing] a store, like any customer, during normal business hours." *Id.*; *see, e.g.*, *People v. Saint-Amans*, 131 Cal. App. 4th 1076, 1079-80 (2005) (customer legally entering a bank to withdraw money that he has fraudulently transferred to his account).

Even first-degree residential burglary in California covers a wide range of conduct. It includes entering an open house and pilfering a real estate agent's wallet from her purse, *People v. Little*, 206 Cal. App. 4th 1364, 1367-70 (2012), and entering a client's home to sell him fraudulent securities, *People v. Salemme*, 2 Cal. App. 4th 775, 777-78 (1992) (applying Cal. Penal Code §§ 459, 460(a)); *see People v. Nguyen*, 40 Cal. App. 4th 28, 30-35 (1995) (similar).

In the pre-*Johnson* proceedings below, the Government contended that these examples are "outlier[s]" that can be ignored in an "inquiry [that] is not directed to conduct at the margins of the statute, but rather to a usual or ordinary violation." Gov't C.A. Br. 27, 29-30 (internal citations omitted). But the Government has never been able to articulate *how* a court is to go about determining which instances of an offense are "outliers" that can be ignored, and which

instead exemplify the "ordinary case." What the "ordinary case" of California burglary involves, and how much risk of force it poses, is anyone's guess.

It was precisely this search for the "usual or ordinary" instance of a particular offense that this Court found impossible in *Johnson*: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" 135 S. Ct. at 2557 (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). That is what makes the "ordinary case" approach so vague. Unlike the traditional categorical approach, which looks simply to "the minimum conduct criminalized by the state statute," the residual-clause analysis requires pinpointing some median or modal version of the crime. *Moncrieffe*, 133 S. Ct. at 1684; *see Baptiste*, 841 F.3d at 610 n.10.

The Government discounts *Johnson*'s on-point analysis in favor of this Court's offhand description of generic burglary as the "classic example" of a crime of violence under the § 16 residual clause. *Leocal*, 543 U.S. at 10. That stray line came years before *Johnson*, where this Court recognized that the same unanswerable questions cannot be answered even for generic burglary: "Does the ordinary burglar invade an occupied home by night or an unoccupied home by day?" *Johnson*, 135 S. Ct. at 2558. *Leocal*'s description of generic burglary only confirms *Johnson*'s observation that "many" residual clause cases that at first seem "easy turn out not to be so easy after all." *Id.* at 2560.

But even if *Johnson* had not superseded *Leocal*'s comment about generic burglary, that characterization would not help the Government for two reasons. First, *Leocal*'s observation says little about statutes, like California's, that are "broader than generic burglary." *United States v. Fish*, 758 F.3d 1, 8 (1st Cir. 2014). Second, *Johnson* also refutes the lesson that the Government tries to draw from *Leocal*: that it is enough to show that a residual clause like this "has a readily ascertainable core." Gov't Br. 41. *Johnson* rejected "any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality." 135 S. Ct. at 2561.

Because the § 16 residual clause provides no greater clue how a court is supposed to identify the "ordinary case," it yields the same constitutionally impermissible level of arbitrariness and unpredictability as its ACCA counterpart.

2. The § 16 residual clause makes no more clear how to measure the "risk" a hypothetical offense poses.

Like the ACCA's residual clause, the § 16 residual clause compounds the indeterminacy by yoking the "ordinary case" inquiry to an imprecise "substantial risk" standard. The clause requires courts to ascertain whether the "risk" of "physical force" posed by a judicially imagined "ordinary case" of a particular offense is sufficiently "substantial." That question is as unanswerable for the § 16 residual clause as it was for the ACCA's.

Courts might try examining statistics about particular crimes to calculate the risk that force will be used, just as this Court did before *Johnson* in considering whether crimes satisfied the ACCA's "serious potential risk" standard. *Sykes v. United States*, 564 U.S. 1, 10-12 (2011); *Chambers v. United States*, 555 U.S. 122, 129-30 (2009). But *Johnson* rejected the statistical approach for reasons equally applicable here: There are "tens of thousands of federal and state crimes for which no [such] reports exist," and "even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves." 135 S. Ct. at 2559. The Government does not even try to explain why statistics would be any more available or edifying for the comparable "risk" inquiry under the § 16 residual clause.

This case illustrates the struggle with seeking solace in statistics. The Government has never mustered any data showing how often California "burglars" use physical force against the person or property of another. That information does not exist. The California Attorney General compiles various crime statistics, but not the degree of force or violence in the context of California burglary.[1] Meanwhile, the Bureau of Justice Statistics conducted a nationwide survey in 2010 that found an approximately 7% "victimization" rate nationwide connected with burglary, meaning

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[1] Office of the Attorney General, California Department of Justice, *Crime in California* 10 (2015), http://tinyurl.com/zxphf2q.

that a household member was at home at the time of the burglary and became a victim of a violent crime as a result.[2] But that study sheds no light on whether the degree of risk posed by California's idiosyncratic version of burglary is sufficiently "substantial." If this Court were to remand, the Court of Appeals would have no basis to make this determination here.

That leaves courts with nothing more than gut instinct as to how much risk a particular offense poses. Here, for example, lifetime banishment and severe sentencing consequences would turn on a judge's estimate of the risk involved in entering a home to commit theft by day (or maybe securities fraud by night). But here, as in *Johnson*, "common sense" provides no meaningful guidance to courts in determining where to place the "ordinary case" of "thousands of unenumerated crimes" on a spectrum of riskiness. 135 S. Ct. at 2559. One court's common sense may lead it to think that burglary is the "classic example" of a crime that "involves a substantial risk that the burglar will use force against a victim in completing the crime," *Leocal*, 543 U.S. at 10, though that same court may think otherwise on further reflection, *see supra* at 16-17. But even going with the first impression, it would not help a court figure out what to think about California's oddball version of burglary. And other states' definitions of "burglary" have their own idiosyncrasies. *Taylor v. United States*, 495 U.S. 575, 591-93 (1990). So a court would have to apply

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[2] Shannan Catalano, Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglary* 1 (Sept. 2010), http://tinyurl.com/zer9dg6.

new "common sense" not only for each crime, but for each jurisdiction.

Just as this Court "failed to establish any generally applicable test that prevents the risk comparison required by the [ACCA] residual clause from devolving into guesswork and intuition," there is no workable solution for § 16's equivalent provision. *Johnson*, 135 S. Ct. at 2259.

B. The Government's revised position on the § 16 residual clause lacks merit.

For these reasons, the Government was right when it recognized in *Johnson* that the § 16 residual clause "is equally susceptible to petitioner's central objection to the [ACCA] residual clause." Gov't *Johnson* Br. 22-23. Evidently, this Court agreed in *Johnson*. The Government cited numerous examples of laws that "use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" including standard reckless-endangerment laws. *Johnson*, 135 S. Ct. at 2561. The Court distinguished "*almost all*" of them—but not § 16. *Id.* (emphasis added). Specifically, the Court observed that "almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id.* This Court explained that those other laws would not sink with the ACCA's residual clause because they merely "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id.* What made the ACCA residual clause different was that it "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Id.*; *see Welch*, 136 S. Ct. at

1262. The § 16 residual clause shares that same attribute—just as the Government had argued—which is what made it different from "almost all" the others as well.[3]

Without explaining (or even acknowledging) its prior position, the Government now argues the opposite. It latches onto three textual quiddities that, it says, make all the constitutional difference. This descent into "the miasma of the minutiae" is unavailing. *Gonzalez-Longoria*, 831 F.3d at 684-85 (Jolly, J., dissenting). Indeed, when this Court explained last Term in *Welch* why "[t]he residual clause failed" in *Johnson*, it did not even mention any of the attributes the Government now emphasizes. 136 S. Ct. at 1262. And certainly none of them makes the § 16 residual clause any "more predictable." Gov't Br. 29.

1. The phrase, "in the course of committing the offense," does not provide any more clarity.

The Government first notes that the § 16 residual clause contains the phrase "in the course of committing the offense," whereas the ACCA's does not. Br. 31. That textual distinction, the Government contends, imposes a "temporal restriction" by prohibiting courts from considering "risks arising *after* the course

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[3] The Government's analogy to child endangerment laws is misplaced here for the same reason. Br. 43 (citing N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016)). Like "almost all" the laws the Government cited in *Johnson*, such laws require inferring a degree of risk from the specific defendant's actual conduct, not a hypothetical defendant's conduct in an imagined "ordinary case."

of committing the offense." *Id.* But the Government cites no authority for that "restriction." That is because courts—and the Government itself—have rejected it.

The Government has repeatedly persuaded courts that inchoate offenses, like solicitation and conspiracy, may be crimes of violence even though they may "be committed with the mere utterance of words and any actual force would not come until *sometime later*, *after* the ... offense had been completed." *Prakash v. Holder*, 579 F.3d 1033, 1036-37 (9th Cir. 2009) (emphasis added). The § 16 residual clause "turns on the risk of physical force as a consequence of the criminal conduct at issue, not on the timing of the force." *Id.* at 1036. Hence a crime may fall within the clause "even if the actual violence may occur after the [crime] itself." *Id.*; *see Ng v. Attorney Gen.*, 436 F.3d 392, 397 (3d Cir. 2006) (solicitation offense is a crime of violence); *United States v. Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993) (attempt offense is a crime of violence). Courts thus speculate whether, as the future criminal plan is "*being played out*, physical force will be exerted against some person or some property," *Aragon*, 983 F.3d at 1313 (emphasis added), just as the ACCA residual clause "requires the judge to imagine how the idealized ordinary case of the crime *subsequently plays out*," *Johnson*, 135 S. Ct. at 2557-58 (emphasis added). The Government is just wrong in asserting that the § 16 residual clause "foreclose[es] inquiry into subsequent consequences." Br. 35.

Better yet, consider that erstwhile "classic example," burglary. *Leocal*, 543 U.S. at 10. The elements of generic burglary are satisfied upon unlawful entry

with bad intent. Yet, as *Johnson* explained, "[t]he act of ... breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises ... because the burglar might confront a resident in the home *after* breaking and entering." 135 S. Ct. at 2557. More specifically, and relevant here, when the Ninth Circuit held that California's version of burglary fits within the § 16 residual clause, it too focused on events that would occur *after* the act of "*enter*[*ing*] a dwelling with felonious or larcenous intent"—what the Government calls "post-entry events." Br. 35. Critical was the risk that a burglar "will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (emphasis added) (quoting *Becker*, 919 F.2d at 571); *see* Pet. App. 16a-17a; *Baptiste*, 841 F.3d at 618 n.19. Those risks are just as "remote from the criminal act" as they were under the ACCA. *Johnson*, 135 S. Ct. at 2559.

The Third Circuit, too, has rejected the interpretation of the phrase "in the course of committing" that the Government now advocates. The court held that a statute prohibiting possession of a firearm with the intent to use it constitutes a crime of violence. *Henry v. Bureau of Immigration & Customs Enf't*, 493 F.3d 303, 309-10 (3d Cir. 2007). The court reached that conclusion even though "the offense is complete ... at the moment [the defendant] possessed the weapon and had a thought of intending to use that weapon against another." *Id.* Addressing the phrase "in the course of committing," the court reasoned that "it is

irrelevant that the technical elements have already been accomplished." *Id.* at 310.

If this Court were to adopt the Government's current reading, it would cast doubt on all these cases, generating even greater confusion about the § 16 residual clause's scope.

Even if the § 16 residual clause did limit the inquiry to conduct committed before the crime is complete, however, that would not make the statute "more manageable and predictable than in the ACCA context." Gov't Br. 32. Courts would still have to imagine the "ordinary case" of a particular offense and then imagine which parts of that scenario would transpire before the offense is "complete." It would just be a different "double act of imagination." *Id.* Truncating the crime would thus do nothing to address *Johnson*'s holding that an "abstract inquiry offers significantly less predictability than one '[t]hat deals with the actual, not with an imaginary condition other than the facts.'" 135 S. Ct. at 2561. A truncated imaginary inquiry is no less imaginary.

The Government also suggests that the phrase "in the course of" provides a "functional" limitation, by providing that the "substantial risk that physical force will be used in committing the offense must stem from the nature of the acts that constitute the offense." Br. 31; *see* Br. 36-37 (same). That is impossible. The "acts that constitute the offense" are the elements of the offense. And the elements of the offense will *never* establish any use of physical force if the residual clause is at issue. Here is why: Like the

ACCA's residual clause, the § 16 residual clause follows a provision that defines qualifying offenses in terms of their elements. The ACCA residual clause applied only to crimes that did *not* have the elements of the generic enumerated offenses, § 924(e)(2)(B)(ii), and *neither* residual clause applies to an offense that already has "as an element the use, attempted use, or threatened use of physical force." § 16(a); § 924(e)(2)(B)(i). That is what makes them "residual." And that is what makes them both hopelessly vague—they entail a mode of analysis that is "detached from statutory elements." *Johnson*, 135 S. Ct. at 2557-58.

2. "Physical force" is at least as vague as "physical injury."

a. The Government next notes that the § 16 residual clause refers to the "risk that physical force against the person or property of another may be used," whereas the ACCA's residual clause referred to the "risk of physical injury to another." Br. 36. Thus, the Government contends, the "text defines a more concrete *type* of risk." *Id.* But this Court often equates "force" and "injury," treating them as interchangeable. This Court has defined "physical force" in related provisions, for example, to mean "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (addressing 18 U.S.C. § 924(e)(2)(B)(i)); *see Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016) (observing that the reckless use of "physical force" creates a "substantial risk" of "causing injury"). That would mean "risk [of] physical force" *is* "risk of physical injury." So whatever vagueness infects one infects the other.

If anything, though, "risk [of] physical force" is *less* concrete and less precise than "risk of physical injury." After all, an "injury" necessarily leaves a wound (or other observable condition), whereas "force" may come and go without a trace. This Court has repeatedly grappled with the meaning of "physical force" as used in related provisions. Sometimes "[p]hysical force" requires "substantial" or "violent force." *Johnson*, 559 U.S. at 140 (addressing 18 U.S.C. § 924(e)(2)(B)(i)). Other times, "the use or attempted use of physical force" is "satisfied by even the slightest offensive touching." *United States v. Castleman*, 134 S. Ct. 1405, 1409-10 (2014) (quoting *Johnson*, 559 U.S. at 134) (addressing 18 U.S.C. § 922(g)(9)). Thus, the courts of appeals have split on what "physical force" means under § 16.[4]

Likewise, the circuits are split on what intent must accompany a "use of force." Some courts hold that the § 16 residual clause encompasses reckless conduct,[5] while others hold it applies only to crimes involving intentional conduct.[6] This Court has left

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[4] *Compare Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015) (§ 16 requires violent force); *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013) (same); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (same); *and Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (same); *with Santana v. Holder*, 714 F.3d 140, 144 (2d Cir. 2013) (§ 16 extends to any "pressure directed against a person or thing").

[5] *United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014); *Aguilar v. Attorney Gen.*, 663 F.3d 692, 696 (3d Cir. 2011).

[6] *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th

that question open three times.[7] That uncertainty further heightens the difficulty of defining the "risk" that attends a concept like "use of force": "[M]ere possession of a pipe bomb," for example, "holds no risk of the *intentional* use of force," but the possibility that "a pipe bomb can unexpectedly explode" could mean that the offense would count if recklessness were the standard. *United States v. Hull*, 456 F.3d 133, 140 (3d Cir. 2006).

b. The Government is also mistaken in arguing that "hard cases under the ACCA residual clause are easier cases under Section 16(b)." Br. 32. To take the Government's lead example (at 37-38), the force/injury distinction did not make *Leocal* (involving § 16) an "easier" case than *Begay v. United States*, 553 U.S. 137 (2008) (involving the ACCA). To be clear, this Court reached the same conclusion in both cases: Neither clause encompasses "merely accidental or negligent conduct." *Leocal*, 543 U.S. at 9-11. And, even assuming it is appropriate to distinguish two identical holdings based on degree of difficulty, as if they were Olympic dives, the Government misdescribes the cases and their relative difficulty. *Leocal*

Cir. 2008); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006).

[7] The Government asserts (at 17-18) that "this Court's recent decision in *Voisine v. United States* ... suggest[s] a resolution to that issue," but that is wrong: *Voisine*, which addressed a different statute, expressly "does not resolve whether § 16 includes reckless behavior." 136 S. Ct. at 2280 n.4; *see also Castleman*, 134 S. Ct. at 1414 n.8; *Leocal*, 543 U.S. at 13.

expressly declined to rest its holding solely on the statute's "use of physical force" language, looking instead to the statute's broader context. *See* 543 U.S. at 9-11. *Begay* then relied on *Leocal* and applied essentially the same analysis. 553 U.S. at 144-45. Plus, the question presented in *Leocal* had divided the circuits before this Court resolved it. 543 U.S. at 6. Far from demonstrating the § 16 residual clause's clarity, *Leocal* is just another example of how "courts might vary dramatically in their answer" to assessing risk under these provisions where "the text sets forth no criterion." *James*, 550 U.S. at 219 (Scalia, J., dissenting) (citing *Leocal*, 543 U.S. 1).

3. Section 16's lack of exemplar offenses makes it vaguer.

Speaking of text setting forth criteria, the Government's final textual distinction is exactly backward. The Government points out (at 38) that the ACCA's residual clause followed a list of four specific crimes—defining "violent felony" as a crime that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In contrast, the § 16 residual clause is not preceded by any specific offenses. The Government argues that this lack of specific exemplar offenses avoids the "interpretive disputes" that this Court addressed in *James* and *Begay*. Br. 39.

Quite the opposite. In defending the ACCA's residual clause in *Johnson*, the Government argued that "the enumerated offenses ... far from pointing towards vagueness, make the [ACCA] residual clause

more concrete in application than other criminal statutes tied to risk." Gov't *Johnson* Br. 26 (emphasis added); *id.* at 29-31. That is exactly what *James* and *Begay* tried to do—assessing specific exemplar offenses in the hope that they would *clarify* the ACCA's residual clause, consistent with ordinary principles of statutory interpretation. *James*, 550 U.S. at 203; *Begay*, 553 U.S. at 143.

Reversing positions once again, the Government invokes *Johnson*'s conclusion that the four enumerated offenses "did not succeed in bringing clarity to the meaning of the residual clause." 135 S. Ct. at 2559, 2561. But just because these concrete examples did not suffice to clarify the ACCA residual clause does not mean that a statute that lacks them is *less* vague. Rather, it is *more* vague, as it provides no concrete examples at all—not even "confusing" ones—to tether the analysis. Thus, "the INA's lack of an enumerated-crimes clause actually makes its residual clause a 'broad[er]' provision, as it 'cover[s] *every* offense that involved a substantial risk of the use of physical force against the person or property of another.'" *Shuti*, 828 F.3d at 448 (quoting *Begay*, 553 U.S. at 144) (some internal quotation marks omitted).

In any event, the § 16 residual clause does not stand in isolation. Rather, it follows § 16's elements clause, which encompasses offenses in which the use of force is an element of the crime. That structure confusingly limits the residual clause to offenses that do *not* require use of force, but nevertheless present some less-than-certain risk of force. So it is not like a statute that refers to "'shades of red,' full stop." Gov't Br. 39. It is like a statute that refers to "(a) any shade

of red, or (b) any *other* color that involves a substantial risk of appearing reddish."

In the end, though, whatever might be said of the ACCA's "confusing list of examples," we return to the overarching point discussed above (at 13): This Court emphasized in *Johnson* that the "[m]ore important[]" failing of the ACCA residual clause was that it "require[d] application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561; *see id.* at 2559. *Those* were the "[t]wo features" that "conspire[d] to make the ACCA residual clause unconstitutionally vague," *Johnson*, 135 S. Ct. at 2557; *see Welch*, 136 S. Ct. at 1262. The § 16 residual clause shares them both.

C. The § 16 residual clause has generated substantial confusion.

1. Like its ACCA counterpart, the § 16 residual clause "has 'created numerous splits among the lower federal courts', where it has proved 'nearly impossible to apply consistently.'" *Johnson*, 135 S. Ct. at 2560. We have already noted two unresolved issues: whether § 16 encompasses crimes with a mens rea of recklessness or applies only to intentional crimes, and whether § 16 requires "violent force" or may be satisfied by the risk of any physical touching. *Supra* at 26-27. Both splits involve fundamental questions about the types of risks that a predicate offense must present to satisfy the § 16 residual clause—issues that are sure to recur in cases involving a wide range of offenses.

Beyond that, conflicts abound in cases wrestling with whether specific offenses qualify as crimes of violence under the § 16 residual clause. *See* Nat'l Immigration Project Amicus Br. § I. Like the disagreements that led to this Court's ACCA residual clause cases, those disagreements arise because courts have different approaches to imagining what the hypothetical "ordinary case" of a given offense looks like. Consider a few examples:

Car burglary. In the Fifth and Eighth Circuits, burglary of a vehicle is a crime of violence under § 16, because the "statute requires that the criminal lack authorization to enter the vehicle," and that "requirement alone ... will most often ensure some force is used." *Escudero-Arciniega v. Holder*, 702 F.3d 781, 784-85 (5th Cir. 2012); *see United States v. Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (per curiam). The Ninth Circuit disagrees. *Sareang Ye v. INS*, 214 F.3d 1128, 1130 (9th Cir. 2000). That disagreement is not, as the Government suggests, primarily based on the fact that "California automobile burglary 'does not require an unprivileged or unlawful entry into the vehicle.'" Br. 49 (quoting *id.* at 1133). It stems from how differently courts imagine "numerous ways a person can commit vehicle burglary short of using violent physical force," including opening an unlocked door, "enter[ing] a car through an open window, by means of a stolen key, or with the aid of a 'slim jim.'" *Sareang Ye*, 214 F.3d at 1133. The conflict, then, is rooted in how broadly different judges speculate about how the "ordinary case" of car burglary plays out.

Statutory rape. Three circuits have concluded that statutes criminalizing non-forcible sexual contact with a minor are crimes of violence under the § 16 residual clause, even though the statutes could criminalize contact between high school sweethearts. These circuits observe that, because a state law setting the age of consent deems people below that age categorically "unable to give consent," a violation of the statute "*inherently* involves a substantial risk that physical force may be used in the course of committing the offense." *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003); *see Aguiar v. Gonzales*, 438 F.3d 86, 89-90 (1st Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007); *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996). Two other circuits, in contrast, have not imagined that the ordinary case of statutory rape involves such a risk. They have criticized the other courts' reasoning as "somewhat mechanical in equating a victim's legal incapacity to consent with an actual" lack of consent "and deriving therefrom a substantial risk that physical force may be used in committing the offense." *Valencia v. Gonzales*, 439 F.3d 1046, 1050 (9th Cir. 2006); *see Xiong v. INS*, 173 F.3d 601, 606-07 (7th Cir. 1999).

Evading arrest. The Eleventh Circuit has concluded that the offense of "aggravated fleeing" constitutes a "crime of violence." *Dixon v. Attorney Gen.*, 768 F.3d 1339, 1343, 1345 (11th Cir. 2014). "Aggravated fleeing" does not require intent to use physical force. Nevertheless, relying on *Sykes*, the court found it to be a crime of violence under the § 16 residual clause because "fleeing from police indicates that the individual fleeing is desperate" and "[a] desperate person is likelier to resort to physical force to

complete the objective of fleeing from police, which is evading arrest and prosecution." *Id.* at 1345. In contrast, the Ninth Circuit has held that a statute criminalizing "actually resisting an officer" does *not* constitute a "crime of violence" under the § 16 residual clause, even though it (unlike fleeing) actually requires contact with the police. *Flores-Lopez v. Holder*, 685 F.3d 857, 863-65 (9th Cir. 2012). A conviction under the statute could be established based on "*de minimis* force in resisting an officer," the court explained. *Id.* at 864. "The idea that resisting an officer will inevitably lead to the use of violent, physical force is too speculative to support a conclusion that [the statute] is categorically a crime of violence." *Id.*[8]

These conflicts demonstrate that what this Court said about the ACCA residual clause is equally true of § 16's: "The most telling feature of the lower courts' decisions is not division about whether the residual

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[8] Our brief in opposition identified another split, concerning whether the offense of unauthorized use of a motor vehicle falls within the § 16 residual clause. *See* BIO 26. As the Government correctly reports (at 48), the Fifth Circuit has since resolved that split by aligning itself with other circuits that all—at least for now—hold that the offense is not a crime of violence. The Government is incorrect, however, in suggesting that the Fifth Circuit overruled its precedent in light of *Leocal*. *See, e.g., De La Paz Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) (per curiam) (continuing to deem the offense a crime of violence after *Leocal*), *cert. denied*, 552 U.S. 811 (2007). Rather, the Fifth Circuit reversed course only after this Court vacated and remanded a § 16 residual clause case for reconsideration in light of *Begay* and *Chambers*—two ACCA cases. *See United States v. Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009). This only confirms the interchangeability of the two residual clauses. *See infra* at 36-37.

clause covers this or that crime," but "rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Johnson*, 135 S. Ct. at 2560. That is why judges have decried the confusion and inconsistency that the § 16 residual clause has wrought. In one case, for instance, Judge Calabresi concurred separately "to note that the cases in this area are somewhat difficult to reconcile with each other" and that "[i]t might be desirable if the Supreme Court or Congress were to give the circuits additional guidance in this area." *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 176 (2d Cir. 2006) (Calabresi, J., concurring) (internal citations omitted); *see United States v. Serafin*, 562 F.3d 1105, 1111 (10th Cir. 2009) ("Other circuits have struggled with the definition of a crime of violence under" the § 16 residual clause).

More recently, the Third Circuit invalidated the § 16 residual clause only after laboring to decide whether "reckless second-degree aggravated assault" is a crime of violence: It found "little guidance as to how we should go about identifying [the typical] conduct," noting that "during oral argument, neither advocate was able to articulate the ordinary case" of the offense; and it identified no relevant "empirical analysis," so it was left to slog through a review of state cases to assess the conduct they involved. *Baptiste*, 841 F.3d at 611-15, 620-21. The court ultimately concluded that the "indeterminacy of the analysis" meant it could not be made "in a principled way." *Id.* at 620.

2. In light of all this, the Government is wrong to say that the § 16 residual clause "bears no resemblance to the ACCA's residual clause" with respect to the confusion it has generated in the federal courts. Br. 45. This, too, is a "cacophony of interpretive confusion." Br. 28. The chief basis for the Government's assertion is that *this* Court has taken fewer § 16 residual clause cases. Br. 46-47. But *Johnson* did not focus just on this Court's interpretive challenges; it took pains to document that "[t]his Court is not the only one that has had trouble making sense of the residual clause." 135 S. Ct. at 2559-60. And *Johnson* certainly did not suggest there is some minimum number of residual clause "beasties" that must be added "to [this Court's] bestiary of ... residual-clause standards" before a residual clause will fall. *Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of certiorari).

This Court can predict with near certainty that these circuit splits—and many more to materialize—will all eventually require this Court's attention. When, for example, the evading-arrest issue makes it to this Court, there is every reason to expect it will be a *Sykes* redux. With the recent ACCA experience under its belt, this Court does not need to endure another "failed enterprise" before reaching the same conclusion here. *Johnson*, 135 S. Ct. at 2560.

The Government's simplistic tally of cases also ignores that § 16 is far less likely to lead to appeals than the ACCA. First, § 16 operates frequently in the immigration context, in which the noncitizen enjoys no right to court-appointed counsel to seek any appellate

review, much less to petition this Court.[9] Thus, in most of the cases cited above, certiorari was never sought.

Second, there are fewer § 16 residual clause cases overall because the Government is less dependent on it than it was on the ACCA's residual clause. Whereas the ACCA residual clause followed a list of only four offenses, the INA's "crime of violence" reference is just one of "21 subparagraphs enumerat[ing] some 80 different crimes" in the definition of "aggravated felony," *Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016).

The Government also forgets that this Court has treated its ACCA residual clause cases as clarifications of the § 16 residual clause as well. Thus, after interpreting the ACCA's residual clause, this Court regularly vacated and remanded lower court decisions involving the § 16 residual clause. *See Armendariz-Moreno v. United States*, 555 U.S. 1133 (2009) (in § 16 residual clause case, vacating and remanding for further consideration in light of *Begay* and *Chambers*); *Castillo-Lucio v. United States*, 555 U.S. 1133 (2009) (same); *Addo v. Mukasey*, 555 U.S. 1132 (2009) (vacating and remanding in light of *Chambers*); *Serna-Guerra v. Holder*, 556 U.S. 1279 (2009) (same); *Reyes-Figueroa v. United States*, 555 U.S. 1132 (2009) (same).

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[9] *See Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part I*, 33 Cardozo L. Rev. 357, 359 (2011).

This practice underscores an overarching point about this entire exercise: Courts have long treated the two provisions, and the interpretive quandaries they pose, as fundamentally analogous. *See Chambers*, 555 U.S. at 133 n.2 (Alito, J., concurring) ("18 U.S.C. § 16(b) ... closely resembles ACCA's residual clause"); *United States v. Mincks*, 409 F.3d 898, 900 (8th Cir. 2005) (applying several § 16 cases to an ACCA residual clause case); *United States v. Daye*, 571 F.3d 225, 233-34 (2d Cir. 2009) (same); *Jimenez-Gonzalez*, 548 F.3d at 562 (applying ACCA cases to a § 16 residual clause case). So have the Government's own immigration adjudicators. *See, e.g., In re Francisco-Alonzo*, 26 I. & N. Dec. 594, 596-600 (BIA 2015).

Thus the interpretive confusion that the ACCA's residual clause generated has directly plagued the § 16 residual clause. The Ninth Circuit, for example, first held that fleeing the police was *not* a crime of violence. *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir. 2008). Later, in an ACCA case, the Ninth Circuit held that *Penuliar* "is no longer good law in light of the Supreme Court's decision in *Sykes*." *United States v. Martinez*, 771 F.3d 672, 677 (9th Cir. 2014). Then this Court vacated *that* decision in light of *Johnson*. *Martinez v. United States*, 135 S. Ct. 2939 (2015). If *Johnson* does not control here, who knows where that leaves the fleeing offense under the § 16 residual clause.

In any event, the case tally, even if lopsided, proves little. *Johnson* said only that "the failure of persistent efforts ... to establish a standard can provide *evidence* of vagueness," and that this Court's "repeated attempts and repeated failures to craft a

principled and objective standard out of the [ACCA] residual clause *confirm* its hopeless indeterminacy." 135 S. Ct. at 2558 (internal quotation marks, citations, and alterations omitted) (emphasis added). Unsurprisingly, this Court has invalidated laws as unconstitutionally vague even without ever having been called upon to interpret them. *See, e.g.*, *United States v. Evans*, 333 U.S. 483, 495 (1948).

II. *Johnson*'s Vagueness Analysis Applies Equally In The Deportation Context.

Because § 16's residual clause is unconstitutionally vague under *Johnson*, the Government may not invoke it to deport Dimaya for having been "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The Government insists, however, that *Johnson*'s vagueness analysis does not "appl[y] to statutory provisions applied in immigration removal proceedings." Br. 13. It proposes the least demanding vagueness standard imaginable—that it is fair to permanently banish a noncitizen from the country unless the basis is "so unintelligible that it [i]s essentially not a rule at all." Br. 25 (citation and internal quotation marks omitted). That is not the test.

This Court held 65 years ago that "the established criteria of the 'void for vagueness' doctrine" applied to an immigration statute governing deportation, in "view of the grave nature of deportation." *Jordan*, 341 U.S. at 231. Far from questioning this precedent, this Court has only reaffirmed the severity of deportation in the intervening decades. This Court should decline

the Government's invitation to overrule *Jordan*, particularly in a case about the interpretation of a *criminal* statute.

A. *Jordan* held that the standard vagueness analysis applies to deportation statutes.

Jordan addressed an immigration statute providing that noncitizens convicted of "crime[s] involving moral turpitude" are deportable. 341 U.S. at 224. This Court addressed whether that phrase was unconstitutionally vague. "Despite the fact that this is not a criminal statute," this Court applied "the established criteria of the 'void for vagueness' doctrine" because "deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* at 231 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). Under the standard "test" applied in criminal cases, this Court examined "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-32 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926)). Ultimately, the Court held that "this test has been satisfied" because "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." *Id.* at 232.

The Government nevertheless contends that *Jordan* did not decide whether the full-strength void-for-vagueness standard applies in the immigration context. Br. 20. The Ninth and Tenth Circuits both dismissed this argument as "baffling." Pet. App. 6a;

Golicov, 837 F.3d at 1069. And for good reason. *Jordan* did not simply assume *arguendo* that the ordinary vagueness inquiry applies. Rather, this Court applied the "established" vagueness standard "*[d]espite the fact* that th[e Immigration Act] is not a criminal statute," because of "the grave nature of deportation," which is tantamount to "a penalty." *Jordan*, 341 U.S. at 231 (emphasis added). That the Court itself raised the issue does not make it any less a holding. This Court need not "always confine[] itself to the set of issues addressed by the parties," particularly with respect to threshold matters "easily subsumed within the question on which [the Court] granted certiorari"—including "the proper legal standards" governing an issue. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (quotation marks omitted); *see, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 695 n.4 (1996).

Thus, in the 65 years since *Jordan*, the circuits have held that *Jordan* "made it clear that an alien may bring a vagueness challenge to a deportation statute" under the standard test. *Beslic v. INS*, 265 F.3d 568, 571-72 (7th Cir. 2001). Indeed, every circuit to address the § 16 question presented here in the immigration context found *Jordan* controlling. The Sixth Circuit explained that "[t]he criminal versus civil distinction is ... 'ill suited' to evaluating a vagueness challenge regarding the 'specific risk of deportation.'" *Shuti*, 828 F.3d at 445 (citing *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010)). The Tenth Circuit observed that "*Jordan* recognized that a necessary component of a non-citizen's right to due process of law is the prohibition on vague deportation

statutes." *Golicov*, 837 F.3d at 1069 (internal quotation marks omitted). And, most recently, in the Third Circuit, the Government "wisely" did not even contest that *Jordan* controlled. *Baptiste*, 841 F.3d at 615 n.17.

B. This Court should not consider overruling *Jordan* in a case involving a statute with criminal applications.

Even if this Court were inclined to reconsider *Jordan*, this case presents an exceedingly poor context in which to do so. Unlike the "crime involving moral turpitude" provision in *Jordan*, § 16 *is* a criminal statute. It is part of Title 18, the criminal code, and has criminal applications as well.

Indeed, even as incorporated into the INA, § 16 retains criminal applications. The INA criminalizes reentering the country illegally after being removed "subsequent to a conviction for an aggravated felony"—the INA term whose definition incorporates § 16. 8 U.S.C. § 1326(b)(2). Indeed, it was in the context of such a prosecution that the Seventh Circuit endorsed the decision below and held § 16's residual clause void for vagueness. *See Vivas-Ceja*, 808 F.3d 719. At the certiorari stage, the Government pointed to *Vivas-Ceja* as a decision that is squarely aligned with the decision below and conflicts with other courts' opinions—*not* as a decision that is distinguishable because it involves a criminal rather than civil penalty. Pet. 26; Cert. Reply 2.

If the Government were correct that a skim-milk vagueness standard governed deportation statutes, then the § 16 residual clause could be valid as applied

in deportation proceedings, yet simultaneously invalid under *Johnson* as applied in an illegal-reentry prosecution. Thus Dimaya could be deported for having been "convicted of an aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii), but if he then reentered the country illegally, he could *not* be prosecuted as someone "whose removal was subsequent to a conviction for commission of an aggravated felony," § 1326(b)(2). That makes no sense. Rather, a statute with "criminal applications ... must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring); *see also* Nat'l Ass'n of Fed. Defenders Amicus Br. § I (describing similar anomalies under §§ 1326(d) & 1327).

Courts thus apply the same void-for-vagueness standard across contexts when interpreting statutes with both civil and criminal applications. In *A.B. Small*, for example, this Court held that a statute prohibiting "unjust or unreasonable" prices for food staples was void for vagueness in the civil context, adopting the reasoning of cases that found the same provision unconstitutionally vague in its criminal application. *A.B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 238 (1925) (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921)). The case was thus recognized at the time as *eliminating* the distinction between civil and criminal vagueness standards.[10]

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[10] *See* Note, *Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process*, 38 Harv. L. Rev. 963, 964 n.1, 967 (1925) (observing that *A.B. Small* had "abandoned" the "distinction between criminal and civil

Paradoxically, the Government cites *A.B. Small* as the foundation of a distinct civil vagueness standard. Br. 16, 25. While the Court eventually held that less punitive civil statutes are subject to a less demanding vagueness standard, *A.B. Small* drew no distinction between criminal proceedings and the civil case before it. Rather, it demonstrates that a single statute with civil and criminal applications is either vague or not, across all contexts.

Similarly, this Court treats civil and criminal applications of a statute equally under a related doctrine, the rule of lenity. *Leocal* is a prime example. "Because [courts] must interpret [a] statute consistently, whether [they] encounter its application in a criminal or noncriminal context," this Court applied the rule of lenity to § 16 in *Leocal* even though it "deal[t] with § 16 in the deportation context". 543 U.S. at 11 n.8; *see Clark v. Martinez*, 543 U.S. 371, 380 (2005); *FCC v. Am. Broad. Corp.*, 347 U.S. 284, 296 (1954).

The Government argues that cases like *Clark* apply only to rules of construction, not to questions of constitutional validity. Br. 27. But the void-for-vagueness doctrine evolved directly from the rule of lenity, so the same due process concerns underlie both. *See Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring). They are "related manifestations of the fair warning requirement," and the rule of lenity is just a "junior

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standards," and that it was "extremely doubtful" whether the Court would apply a "less definite standard" in the civil context); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 69 n.16 (1960).

version of the vagueness doctrine." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

In short, because § 16's residual clause also operates as a criminal statute, the criminal void-for-vagueness standard described in *Johnson* would apply even if *Jordan* were overturned for statutes with purely civil consequences.

C. *Jordan* Was Correctly Decided.

Even if this Court were inclined to revisit *Jordan* here, it should adhere to *Jordan*'s application of the heightened vagueness test to deportation statutes. *Jordan*'s rule is rooted in the "well established" notion that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings," *Demore v. Kim*, 538 U.S. 510, 523 (2003) (internal quotation marks omitted), and it is consistent with this Court's many cases holding that a more robust vagueness standard applies to civil statutes with more severe consequences, like deportation.

1. Deportation laws are punitive and carry severe consequences.

Jordan recognized that deportation laws have the sorts of severe consequences and punitive characteristics that put them on a par with criminal statutes. Traditional vagueness principles apply to crimes punishable by even probation or short sentences. Surely, most of us would take those punishments over lifetime banishment from our family and the only home we have ever known.

The Government nevertheless insists that "removal is not a punishment or penalty for the crime." Br. 21. But, since the Founding, it has been understood that "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, *Madison's Report on the Virginia Resolutions (1800)*, 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 546, 555 (Jonathan Elliot ed., 1891). Nearly 70 years ago, this Court directly refuted the Government's argument, observing that, while "deportation is not technically a criminal punishment," *Fiswick v. United States*, 329 U.S. 211, 222 n.8 (1946), it is nonetheless "a penalty," *Fong Haw Tan*, 333 U.S. at 10. It "may visit great hardship on the alien" and "result in the loss of all that makes life worth living," *Fiswick*, 329 U.S. at 222 n.8 (internal quotation marks omitted).

This Court provided an equally direct refutation just a few years ago: "Although removal proceedings are civil in nature, deportation is ... an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants" in criminal proceedings. *Padilla*, 559 U.S. at 364-65 (internal citation omitted). "Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century," making it "most difficult to divorce the penalty from the conviction." *Id.* at 365-66 (internal quotation marks omitted). Accordingly, *Jordan*'s conclusion that "the grave nature of deportation" warranted application of the "established" void-for-vagueness doctrine has only been fortified over the past 65 years. 341 U.S. at 231.

2. The ordinary vagueness analysis governs civil statutes imposing severe consequences.

All this authority supports a simple—and simply undeniable—proposition: If ever there was a civil penalty that is sufficiently severe as to warrant application of the traditional vagueness standard, deportation is it. The Government does not appear to dispute this proposition. It just argues that this "Court has long drawn a firm distinction between criminal and civil statutes," such that ordinary vagueness principles *never* apply to any penalty on the civil side. Br. 14. Even while describing this civil/criminal distinction as a "bedrock distinction," the Government acknowledges in a footnote that this Court does not follow it: Civil laws implicating "basic First Amendment freedoms" are subject to "a more stringent vagueness test." Br. 14 n.2 (citing *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 499 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

The First Amendment is not the only significant fissure in this purported "bedrock." This Court has repeatedly rejected any such sharp line. It has directed that vagueness standards are matters of "degree" that "should not ... be mechanically applied." *Hoffman Estates*, 455 U.S. at 498. It has held that due process protections against vague laws are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). And in *A.B. Small*, the food pricing case mentioned above, this Court rejected the

same argument the Government makes here. Rebuffing an "attempt[] to distinguish" related vagueness cases that "were criminal prosecutions," this Court held that "that is not an adequate distinction." 267 U.S. at 239.

Instead, the distinction this Court has drawn is the one it articulated in *Hoffman Estates*: cases (civil or criminal) with "severe" consequences versus those where "the consequences of imprecision" are "qualitatively less severe." 455 U.S. at 498-99. The drug-paraphernalia ordinance in *Hoffman Estates*, for example, "nominally impose[d] only civil penalties" but was "quasi-criminal" given its "clear" "prohibitory and stigmatizing effect." *Id.* at 499-500 & n.16. So this Court applied a "relatively strict" vagueness standard. *Id.* at 499. Similarly severe, as the Government concedes, are civil laws implicating "basic First Amendment freedoms." Br. 14 n.2. In contrast, pure economic regulations are held to a less stringent standard because businesses may plan for them (and help shape them) in advance of enforcement. *Hoffman Estates*, 455 U.S. at 498-99.

The Government ignores this Court's pronouncement that the civil/criminal line "is not an adequate distinction," *A.B. Small*, 267 U.S. at 239, and this Court's analysis in *Hoffman Estates*. The Government supports its view mainly with quotes from *criminal* cases making statements like, "the void-for-vagueness doctrine requires that a *penal statute* define the *criminal offense* with sufficient definiteness." Br. 15 (emphasis the Government's) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). These statements

do not override *Hoffman Estates* and they do not suggest that the heightened vagueness standard cannot apply to a deportation case any more than they suggest that the same standard cannot apply to First Amendment cases.

In formulating its concededly new standard for all civil cases, the Government also relies on several cases predating *Hoffman Estates*. Br. 15-19, 25-26. Those cases are inapposite for that reason alone. Regardless, none of those cases adopts anything close to the Government's proposed rule that civil statutes must be upheld unless their language is utterly "unintelligible." Br. 25 (internal quotation marks omitted). Those cases actually *embraced* criminal vagueness standards for civil cases, while occasionally making derogatory comments about the statute before them. When *A.B. Small* found the civil pricing provision so "unintelligible" that it was essentially "not a rule at all," this Court simply borrowed the reasoning from *L. Cohen Grocery Co.*—a criminal case. 267 U.S. at 240. Likewise, when *Giaccio* rejected a law that contained "no standards at all," 382 U.S. at 403, this Court invoked a criminal case that, in nearly identical words, rejected a provision for being so "vague, indefinite and uncertain" that it "condemn[ed] no act or omission," *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939). And when *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), rejected a vagueness challenge to a civil statute regulating commodities contracts because "'a standard of some sort was afforded,'" this Court applied the reasoning from *L. Cohen Grocery* and *Connally*, both of which interpreted statutes imposing criminal penalties. *Id.* at 196.

None of these cases drew a strict line between civil and criminal vagueness standards or adopted lower standards for all civil cases. Rather, as cases like *Jordan* and *Hoffman Estates* later explained, punitive laws and those with otherwise severe consequences—including deportation laws and laws implicating First Amendment rights—are subject to the same vagueness scrutiny as criminal laws.

The other older cases the Government cites are also consistent with this Court's nuanced approach. *Winters v. New York* is a criminal case that, naturally, applied the traditional vagueness analysis. It noted in passing that "[t]he standards of certainty in statutes punishing ... offenses is higher than in those depending primarily upon civil sanction for enforcement." 333 U.S. 507, 515 (1948). But *Hoffman Estates* later explained that this lower standard applies only where "the consequences of imprecision are qualitatively *less severe*." 455 U.S. at 499 & n.13 (emphasis added). The Government is therefore correct that "licensing qualifications are not subject to the same vagueness test as criminal provisions." Br. 18-19 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). But that is not because there is one exceedingly permissive vagueness standard for all civil cases. It is because the consequences of misunderstanding a licensing requirement are less severe—and certainly not nearly as severe as lifetime banishment.

Similarly, *Mahler v. Eby*, 264 U.S. 32 (1924), concerned an immigration statute that delegated authority to the Secretary of Labor to identify "undesirable residents" who may be expelled from the

country. *Id.* at 40. This Court applied a more relaxed vagueness standard, but not because of some categorical rule about civil cases. Rather, it held that "[t]he rule as to a definite standard of action is not so strict *in cases of the delegation of legislative power to executive boards and officers*." *Id.* at 41 (emphasis added); *see United States v. Matchett*, 837 F.3d 1118, 1126 (11th Cir. 2016) (W. Pryor, J., respecting the denial of rehearing en banc) (*Mahler* addressed the vagueness standard for "statutes that provide discretion to government actors"). *Mahler* does not apply here because there is no delegation question.

If *Mahler* had announced a bright-line rule distinguishing civil from criminal statutes, this Court would surely have understood that when it decided *A.B. Small*, the civil vagueness case argued shortly after *Mahler*. And it would never have rejected that very distinction in *A.B. Small* without comment. *Supra* at 42. Rather, *A.B. Small* followed a different rule from *Mahler* because it lacked the critical feature that drove the holding in *Mahler*—a delegation issue. *Jordan* therefore did not need to "suggest that it was overruling *Mahler*"—it wasn't. Gov't Br. 20. Regardless, the line of cases that led to *Jordan* expressly distinguished *Mahler* when interpreting the *substantive terms* of grounds for deportation, in view of the fact that "deportation may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

3. Deportation statutes implicate concerns about fair notice and arbitrary enforcement.

Deportation laws also raise the same concerns that underlie the void-for-vagueness doctrine in the criminal context: ensuring that laws give "ordinary people fair notice of the conduct" they target and avoiding "arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. "[F]airness" and "predictability" are just as essential in "the administration of immigration law." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

a. *Jordan* correctly held that deportation statutes must "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." 341 U.S. at 231-32. As this Court recently reaffirmed, noncitizen criminal defendants must be able to "anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (internal quotation marks omitted). Given the mandatory, permanent deportation that noncitizens convicted of aggravated felonies will suffer, fair notice as to which offenses will carry immigration consequences and "accurate legal advice for noncitizens accused of crimes has never been more important." *Padilla*, 559 U.S. at 364.[11]

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[11] In this respect, deportation stands in contrast to the denial of admission to noncitizens seeking entry to the country.

The Government discounts this lesson from *Padilla*, because the Court did not require criminal defense attorneys to interpret immigration laws that are "not succinct and straightforward." Br. 22 (citing *Padilla*, 559 U.S. at 369). That misses the point. The point is not that we expect defense lawyers to work residual-clause interpretive magic that has eluded the courts. It is that immigration consequences are so central to criminal convictions that defendants' Sixth Amendment rights account for them. Why? Because lawyers are the ones best situated to give defendants clear notice of the immigration implications of a guilty plea or other conviction. Those immigration consequences are no less central when it comes to defendants' due process right to fair notice of their penalties. Here, as under the Sixth Amendment, "[d]eportation is ... 'unique'" in how "'intimately related [it is] to the criminal process.'" *Chaidez v. United States*, 133 S. Ct. 1103, 1110 (2013) (quoting *Padilla*, 559 U.S. at 335).

That is not to say that every constitutional right necessarily applies equally to deportation. As the Government points out, the Court has allowed ex post

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In *Boutilier v. INS*, 387 U.S. 118 (1967), this Court rejected a vagueness challenge to a provision rendering inadmissible those "afflicted with psychopathic personality." *Id.* at 118-19. This Court emphasized that because the petitioner was inadmissible based on "characteristics he possessed *at the time of* his entry" and was "not being deported for conduct engaged in after his entry into the United States," the "constitutional requirement of fair warning has no applicability." *Id.* at 123 (emphasis added); *see Beslic*, 265 F.3d at 571. Like *Jordan*, this case concerns deportation, where "fair notice" is required.

facto laws in the immigration context. Br. 21-22 (citing *Marcello v. Bonds*, 349 U.S. 302 (1955); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); and *Galvan v. Press*, 347 U.S. 522 (1954)). But just because one constitutional right is inapplicable does not mean the rest fall like dominoes. That is especially so where this Court has since reflected that if it "were ... writing on a clean slate," it might find "that the ex post facto Clause, even though applicable only to punitive legislation, *should be applied to deportation*" given that "the intrinsic consequences of deportation are so close to punishment for crime." *Galvan*, 347 U.S. at 531 (emphasis added).

Moreover, much of what this Court denied in those old ex post facto cases, it has made up for in recent cases denying retroactive effect to immigration statutes. *E.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479, 1490-92 (2012). Thus, in *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court declined to apply a new law that would have denied a noncitizen relief from removal because of his prior conviction. The "potential for unfairness" in applying that law retroactively was "significant and manifest." *Id.* at 323. This Court held that the ordinary presumption against retroactivity was "buttressed" in deportation cases "by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

b. The "more important aspect of vagueness doctrine" is protecting against arbitrary enforcement. *Kolender*, 461 U.S. at 358. But the Government contends arbitrary enforcement should be less of a

concern for deportation statutes because the Constitution and Congress delegate authority to the Executive Branch to administer the nation's immigration laws, as if that delegation were an invitation to adopt standards that are impossible to understand. Br. 23-24. The Judiciary, of course, retains an essential role in ensuring that immigration enforcement remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). In the "high stakes" world of deportation, only the courts can guarantee that the political branches' "decisions [are not] made a sport of chance." *Judulang v. Holder*, 132 S. Ct. 476, 487 (2011) (internal quotation marks omitted).

The Government also argues that arbitrary enforcement is not a concern because the BIA conducts a centralized review of immigration cases. Br. 24. But, as the Government recognizes, courts do not defer to the Board's interpretations of criminal provisions incorporated into the INA, "potentially leading to inconsistent results." *Id.* (citing *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 571 (2010)). Moreover, the Board's decisions themselves are often hopelessly conflicting. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005) (observing that the Board's decision "flew in the face" of its own precedent). In this case, for example, the Board agreed with the immigration judge that a California burglary conviction is a crime of violence under the § 16 residual clause. Pet. App. 46a-47a. Less than a year earlier, however, the Board had agreed with a different immigration judge who reached the opposite conclusion. *In re Edward*

Octavius Musman, 2010 WL 2224555 (BIA May 7, 2010) (unpublished).[12]

Moreover, the BIA is often cut out of the process altogether. The Government may *summarily* deport any nonpermanent resident it deems to be an aggravated felon "without a hearing before an immigration judge," and with only a fleeting window for judicial review. 8 C.F.R. § 238.1(b)(2)(i); *see* 8 U.S.C. § 1228(b). Thus the amount of process noncitizens receive in the first place can turn on how frontline immigration enforcement officers—who generally are not lawyers—interpret the residual clause. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. (forthcoming 2017), http://tinyurl.com/gv6utqt. The statute's failure to provide "minimal guidelines to govern law enforcement" officers invites arbitrary enforcement. *Kolender*, 461 U.S. at 358.

Against this backdrop, where "immigration law enforcement uses many of the same coercive tools of criminal law enforcement," yet "lacks many of the tools of accountability that typically accompany the criminal law enforcement process," *Jordan*'s constitutional protections against arbitrary enforcement are

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[12] *See also* David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177, 1180 (2016) (demonstrating that "[d]isparities in immigration judges' removal decisions are more than three times larger than disparities in federal judges' decisions about whether to send a convicted criminal to prison" and "that the BIA and the federal courts of appeals do little to counteract these disparities").

as necessary as ever. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wis. L. Rev. 1127, 1160.

III. The Government Overstates The Effect Of Invalidating The § 16 Residual Clause As It Applies To Prior Convictions.

The Government contends that a decision invalidating the § 16 residual clause will yield a host of adverse consequences. The Government made most of the same arguments in *Johnson*. They are no more persuasive here.

1. The Government first notes that § 16 "supplies the definition of 'crime of violence' for many provisions in the federal criminal code," and worries that invalidating its residual clause will have "deleterious consequences" for those other provisions. Br. 52-53. But practically every one of those other statutes applies the "crime of violence" definition to characterize the offense for which the defendant is *currently being charged*, rather than to classify a *prior conviction*, as under the INA and the ACCA. Take, for instance, the statute that enhances criminal penalties on "[a]ny person who ... intentionally uses a minor to commit a crime of violence." 18 U.S.C. § 25(b). There is no predicate "conviction" at all in such statutes.

This difference could turn out to be critical. Section 16's application here, like the ACCA residual clause, cannot be "save[d] ... from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged," rather than "the risk posed by the ordinary case of the defendant's

crime." *Johnson*, 135 S. Ct. at 2561-62. That is because "Congress predicated deportation 'on convictions, not conduct.'" *Mellouli*, 135 S. Ct. at 1986. And the term "conviction" is the "statutory hook" for the highly abstract categorical approach. *Moncrieffe*, 133 S. Ct. at 1685; *see Descamps*, 133 S. Ct. at 2287 ("ACCA increases the sentence of a defendant who has three 'previous convictions' for a violent felony—not a defendant who has thrice committed such a crime.").

But a statute could be "saved" if it (like the one quoted above) *does* focus on the "particular conduct in which the defendant engaged," for which he is currently being prosecuted, rather than place an "emphasis on *convictions*" incurred in some other, perhaps decades-old proceeding. *Johnson*, 135 S. Ct. at 2561-62 (emphasis added). Courts may ultimately decide that the categorical approach does not apply at all in those circumstances, and if so, the § 16 residual clause might be valid in those applications. *Johnson* itself saw a distinction between "apply[ing] an imprecise 'serious potential risk' standard to real-world facts" and "applying[ing] it to a judge-imagined abstraction." *Id.* at 2558; *see id.* at 2561. The decision below expressly reserved that question, Pet. App. 20a n.17, and this Court need not resolve it here.

The Government's invocation of 18 U.S.C. § 924(c) is equally premature because it depends upon the same threshold question. Section 924(c) criminalizes using a firearm in connection with a "crime of violence." Its definition of "crime of violence," 18 U.S.C. § 924(c)(3)(B), is "materially identical" to the § 16 residual clause's, Br. 47. But its context is not: § 924(c)

focuses on the offense in which the defendant used the firearm, not some distinct prior "conviction." Some courts have therefore held that, for that reason, the categorical "ordinary case" analysis does not apply to § 924(c)(3)(B).[13] Others have disagreed.[14] That threshold, statute-specific question will determine the impact of *Johnson* on § 924(c). But because it is not presented here, we agree that this Court may "reserve the question whether Section 924(c)(3)(B) is constitutionally invalid." Gov't Br. 53 n.11.

2. Next, the Government contends that "the invalidation of part of the INA's definition of 'aggravated felony'" would compromise the Government's ability to "ensure that dangerous criminal aliens are removed from the United States." Br. 54. But § 16 is relevant to only one of the 21 INA subsections, listing 80 crimes, that define an "aggravated felony." And the residual clause is only half of § 16; invalidating it would cast no doubt on the constitutionality of § 16(a)'s "elements clause," which looks to the actual

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[13] *See Shuti*, 828 F.3d at 449-50 (holding that the categorical approach does not apply to § 924(c)(3)(B), and thus § 924(c)(3)(B) is valid even though the § 16 residual clause is not); *United States v. McDaniels*, 147 F. Supp. 3d 427 (E.D. Va. 2015); *United States v. Enriques*, No. 8:08CR383, 2016 WL 4273187, at *9 (D. Neb. Aug. 12, 2016) (collecting cases).

[14] *See United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016) (holding that the categorical approach applies); *United States v. Prickett*, 839 F.3d 697, 697 (8th Cir. 2016) (same); *see also United States v. Cardena*, Nos. 12-3680, 12-3683, 12-3747, 13-1374 & 13-2321, 2016 WL 6819696, at *25 (7th Cir. Nov. 18, 2016) (holding that § 924(c)(3)(B) is invalid under *Vivas-Ceja* because the same analysis applies).

elements of actual offenses, rather than the non-elemental conduct that a judge imagines is involved in the "ordinary case" of a particular offense.

Striking the residual clause thus would not undermine any of the other 79½ ways in which the Government can show a conviction for an "aggravated felony"--including a conviction for "murder, rape, or sexual abuse of a minor," "illicit trafficking in a controlled substance," "illicit trafficking in firearms or destructive devices," or, in most states, "burglary." 8 U.S.C. § 1101(a)(43)(A), (B), (C), (G).

And even if the § 16 residual clause were the only basis for treating a conviction as an "aggravated felony," there are many other ways in which a criminal conviction can render a noncitizen deportable. *See* 8 U.S.C. § 1227(a)(2). Here, for instance, the question remains open on remand to the BIA whether Dimaya is removable for having been convicted of two "crime[s] [involving] moral turpitude." Pet. App. 2a n.1. "Escaping aggravated felony treatment" therefore does not necessarily "mean escaping deportation." *Moncrieffe*, 133 S. Ct. at 1692. Rather, "[i]t means only avoiding mandatory removal." *Id.* The forms of relief from removal that might then be available are ultimately discretionary. "As a result, to the extent that" invaliding the § 16 residual clause "may have any practical effect on policing our Nation's borders, it is a limited one." *Id.* (internal quotation marks omitted).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

TABLE OF CONTENTS

	Page
8 U.S.C. § 1101	SA1
8 U.S.C. § 1158	SA6
8 U.S.C. § 1182	SA8
8 U.S.C. § 1227	SA9
8 U.S.C. § 1228	SA14
8 U.S.C. § 1229b	SA16
8 U.S.C. § 1326	SA17
18 U.S.C. § 16	SA19
18 U.S.C. § 25	SA19
18 U.S.C. § 924	SA20

8 U.S.C. § 1101. Definitions

(a) As used in this chapter—

***

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

---

[5] So in original. Probably should be preceded by "is."

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

---

[6] So in original. Probably should be followed by a semicolon.

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. § 1158. Asylum

***

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

***

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

***

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

***

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

***

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

***

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this

title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

***

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

***

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

***

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or

regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

***

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of

the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

***

8 U.S.C. § 1228. Expedited removal of aliens convicted of committing aggravated felonies

***

(b) Removal of aliens who are not permanent residents

(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.

(2) An alien is described in this paragraph if the alien—

(A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or

(B) had permanent resident status on a conditional basis (as described in section 1186a of this title) at the time that proceedings under this section commenced.

(3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the

alien has an opportunity to apply for judicial review under section 1252 of this title.

(4) Proceedings before the Attorney General under this subsection shall be in accordance with such regulations as the Attorney General shall prescribe. The Attorney General shall provide that—

(A) the alien is given reasonable notice of the charges and of the opportunity described in subparagraph (C);

(B) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose;

(C) the alien has a reasonable opportunity to inspect the evidence and rebut the charges;

(D) a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice;

(E) a record is maintained for judicial review; and

(F) the final order of removal is not adjudicated by the same person who issues the charges.

(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

***

8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

***

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

***

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

***

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

***

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

***

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

***

18 U.S.C. § 25. Use of minors in crimes of violence

(a) Definitions.—In this section, the following definitions shall apply:

(1) Crime of violence.—The term "crime of violence" has the meaning set forth in section 16.

(2) Minor.—The term "minor" means a person who has not reached 18 years of age.

(3) Uses.—The term "uses" means employs, hires, persuades, induces, entices, or coerces.

(b) Penalties.—Any person who is 18 years of age or older, who intentionally uses a minor to commit a crime of violence for which such person may be prosecuted in a court of the United States, or to assist in avoiding detection or apprehension for such an offense, shall—

(1) for the first conviction, be subject to twice the maximum term of imprisonment and twice the maximum fine that would otherwise be authorized for the offense; and

(2) for each subsequent conviction, be subject to 3 times the maximum term of imprisonment and 3 times the maximum fine that would otherwise be authorized for the offense.

***

18 U.S.C. § 924. Penalties

***

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in

furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

***

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

***

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

***

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions

by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

***

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

***

No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

A. Immigration removal laws are subject to a less exacting vagueness standard than criminal laws 2

B. Regardless, Section 16(b) is constitutional under the vagueness standard applicable to criminal laws 7

1. Section 16(b) does not create the same "uncertainty about how to estimate the risk posed by a crime" 8

2. Section 16(b) does not create the same "uncertainty about how much risk it takes for a crime to qualify" as a crime of violence 14

3. Respondent greatly overstates the difficulties in applying Section 16(b) 17

4. Invalidating Section 16(b) would call into question the constitutionality of other statutes 21

TABLE OF AUTHORITIES

Cases:

A.B. Small Co. v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) 5, 6

Aguiar v. *Gonzales*, 438 F.3d 86 (1st Cir. 2006), cert. denied, 549 U.S. 1213 (2007) 18

Arizona v. *United States*, 132 S. Ct. 2492 (2012) 3, 5

Begay v. *United States*, 553 U.S. 137 (2008) 9, 12, 15

Carlson v. *Landon*, 342 U.S. 524 (1952) 3, 5

Chery v. *Ashcroft*, 347 F.3d 404 (2d Cir. 2003) 18

Clark v. *Martinez*, 543 U.S. 371 (2005) 6, 21

Delgado-Hernandez v. *Holder*, 697 F.3d 1125 (9th Cir. 2012) 20

Descamps v. *United States*, 133 S. Ct. 2276 (2013) 12

Dickson v. *Ashcroft*, 346 F.3d 44 (2d Cir. 2003) 20

Dixon v. *Attorney Gen.*, 768 F.3d 1339 (11th Cir. 2014) 19

Cases—Continued: Page

Escudero-Arciniega v. *Holder*, 702 F.3d 781 (5th Cir. 2012) 17
Esquivel-Quintana v. *Lynch*, cert. granted, No. 16-54 (6th Cir. Jan. 15, 2016) 19
Fiswick v. *United States*, 329 U.S. 211 (1946) 4
Flores-Lopez v. *Holder*, 685 F.3d 857 (9th Cir. 2012) 19
Galvan v. *Press*, 347 U.S. 522 (1954) 3
Gonzales v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 10
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 2
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 3
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 4, 5
INS v. *St. Cyr*, 533 U.S. 289 (2001) 3, 7
James v. *United States*, 550 U.S. 192 (2007) 15
Johnson v. *United States*, 135 S. Ct. 2551 (2015) ..... *passim*
Jordan v. *DeGeorge*, 341 U.S. 223 (1951) 5
Landon v. *Plasencia*, 459 U.S. 21 (1982) 4
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) ..... *passim*
Mahler v. *Eby*, 264 U.S. 32 (1924) 3, 4, 5, 7
Marcello v. *Bonds*, 349 U.S. 302 (1955) 2, 7
Mathis v. *United States*, 136 S. Ct. 2243 (2016) 10
Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 10
Ng v. *Attorney Gen.*, 436 F.3d 392 (3d Cir. 2006) 13
Padilla v. *Kentucky*, 559 U.S. 356 (2010) 4
Patel v. *Ashcroft*, 401 F.3d 400 (6th Cir. 2005) 19
Penuliar v. *Mukasey*, 528 F.3d 603 (9th Cir. 2008) 20
People v. *Ramirez*, 93 Cal. App. 3d 714 (1979) 11
Peugh v. *United States*, 133 S. Ct. 2072 (2013) 7
Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 21
Prakash v. *Holder*, 579 F.3d 1033 (9th Cir. 2009) 13

Cases—Continued: Page

Sareang Ye v. *INS*, 214 F.3d 1128 (9th Cir. 2000) 18
Shuti v. *Lynch*, 828 F.3d 440 (6th Cir. 2016) 22
Skilling v. *United States*, 561 U.S. 358 (2010) 14, 21
Smith v. *Goguen*, 415 U.S. 566 (1974) 2, 21
Sykes v. *United States*, 564 U.S. 1 (2011) 12, 15, 16
Taylor v. *United States*, 495 U.S. 575 (1990) 10, 11
United States v. *Aragon*, 983 F.2d 1306 (4th Cir. 1993) 13
United States v. *Bonilla*, 687 F.3d 188 (4th Cir. 2012), cert. denied, 134 S. Ct. 52 (2013) 11
United States v. *Cardena*, 842 F.3d 959 (7th Cir. 2016) 22
United States v. *Castleman*, 134 S. Ct. 1405 (2014) 14
United States v. *Franco-Fernandez*, 511 F.3d 768 (7th Cir. 2008) 20
United States v. *Guzman-Landeros*, 207 F.3d 1034 (8th Cir. 2000) 18
United States v. *Hill*, 832 F.3d 135 (2d Cir. 2016) 16, 22
United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) 3, 6
United States v. *Prickett*, 839 F.3d 697 (8th Cir. 2016), petition for cert. pending, No. 16-7373 (filed Jan. 3, 2017) 22
United States v. *Priddy*, 808 F.3d 676 (6th Cir. 2015) 11
United States v. *Robinson*, No. 15-1402, 2016 WL 7336609 (3d Cir. Dec. 19, 2016) 22
United States v. *Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997) 18
United States v. *Venegas-Ornelas*, 348 F.3d 1273 (10th Cir. 2003), cert. denied, 543 U.S. 986 (2004) 20
United States v. *Williams*, 553 U.S. 285 (2008) 21
Valencia v. *Gonzales*, 439 F.3d 1046 (9th Cir. 2006) 18

Cases—Continued: Page

Vargas-Sarmiento v. *United States Dep't of Justice*, 448 F.3d 159 (2d Cir. 2006) 17
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 2, 5
Voisine v. *United States*, 136 S. Ct. 2272 (2016) 14
Xiong v. *INS*, 173 F.3d 601 (7th Cir. 1999) 19
Zivkovic v. *Holder*, 724 F.3d 894 (7th Cir. 2013) 20

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 7
Amend. V (Due Process Clause) 2, 4, 5
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43)(A) 19
8 U.S.C. 1101(a)(43)(U) 13
8 U.S.C. 1103(a)(1) 4
8 U.S.C. 1227(a)(4)(iii) 3
8 U.S.C. 1227(a)(4)(C)(i) 3
8 U.S.C. 1228(b) 4
8 U.S.C. 1229b 4
8 U.S.C. 1229c 4
18 U.S.C. 16(a) 9, 10, 14
18 U.S.C. 16(b) ..... *passim*
18 U.S.C. 921(a)(33)(A) 14
18 U.S.C. 924(c)(3)(B) 22
18 U.S.C. 924(e)(2)(B)(ii) 1
8 C.F.R.:
Section 238.1(b) 4
Section 1003.1(d)(1) 4

Regulation—Continued: Page

Section 1003.1(g)..... 4

Miscellaneous:

S. Rep. No. 225, 98th Cong., 1st Sess. (1983)..... 12

In the Supreme Court of the United States

No. 15-1498

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent fails to show that Section 16(b), as incorporated in the Immigration and Nationality Act's (INA) definition of an aggravated felony, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. He does not refute the fact that the concerns regarding fair notice and legislative delegation that exist in the criminal context are not present in civil removal proceedings administered by the Executive—which is why deportation statutes are subject to a less exacting vagueness standard. He does not dispute that Section 16(b) lacks critical features that led this Court to invalidate the Armed Career Criminal Act's (ACCA) residual clause in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), see 18 U.S.C. 924(e)(2)(B)(ii), including a requirement that courts speculate about how the ordinary case of an offense played out after the crime was finished and a confusing list of enumerated offenses that made it difficult to interpret the requisite degree

of risk. And despite repeated opportunities, respondent has failed to show any significant confusion in lower courts over the meaning of Section 16(b)—certainly nothing approaching the uncertainty that plagued the ACCA's residual clause. This Court has unanimously found Section 16(b) to be clear and capable of reasoned application. *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). It should adhere to that judgment.

A. Immigration Removal Laws Are Subject To A Less Exacting Vagueness Standard Than Criminal Laws

In deciding whether a statute is unconstitutionally vague, this Court has long "expressed greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982). That principle applies to immigration removal statutes.

1. The Due Process Clause requires that a criminal statute provide "fair warning" of the line "between lawful and unlawful conduct" and that it not "delegate" to police and prosecutors authority to decide what specific conduct is prohibited. *Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)); see *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974). Neither of those concerns applies to deportation.

First, as respondent concedes (Br. 52-53), deportation statutes are not subject to ex post facto limitations and thus an alien has no right to notice that his conduct may subject him to removal. See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (alien had no right to be "forewarned of all the consequences of his criminal conduct" and was deportable based on a prior conviction that "was not [a] ground for deportation at the

time he committed the offense"); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). This Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001) (cited at Resp. Br. 53), is not to the contrary. That case held, under ordinary principles of retroactivity, that Congress did not intend for a particular deportation provision to have retroactive effect. *Id.* at 326. The Court considered it "beyond dispute," however, that Congress could have made the statute retroactive had it wished, notwithstanding any "potential unfairness" that might result. *Id.* at 316.

Second, unlike the enforcement of criminal laws, the Nation's "policy toward aliens" is "exclusively entrusted to the political branches of government," *Harisiades*, 342 U.S. at 588-589, and "[t]he power to expel aliens * * * may be exercised entirely through executive officers," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). Congress therefore has the "unquestioned right" to authorize the Executive to remove aliens whose presence "would not make for the safety or welfare of society." *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924). Although a criminal statute authorizing law enforcement to "punish[] all acts detrimental to the public interest" would be unconstitutionally vague, *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921), the same would not be true of a similar deportation statute. See, *e.g.*, 8 U.S.C. 1227(a)(4)(A)(ii) (authorizing deportation based on "criminal activity which endangers public safety or national security"); 8 U.S.C. 1227(a)(4)(C)(i) (same for alien whose presence "would have potentially serious adverse foreign policy consequences").

This Court has thus upheld broad conferrals of removal authority to the Executive Branch that likely would offend the Due Process Clause if they provided standards for criminal liability. See *Mahler*, 264 U.S. at 40 (rejecting vagueness challenge to statute authorizing deportation of specified classes of aliens whom the Secretary of Labor "finds to be undesirable"); *id.* at 41 (removal of aliens "likely to become a public charge"); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deferring to Attorney General's judgment concerning whether offense was "political in nature"). As explained in our opening brief (at 23-24), the centralized framework under which the Attorney General and Secretary of Homeland Security exercise that discretion helps to ensure consistent interpretations.[1]

The fact that deportation carries "severe consequences" (Resp. Br. 44) does not call for a different conclusion. Deportation "may visit great hardship on the alien," *Fiswick* v. *United States*, 329 U.S. 211, 222 n.8 (1946), and has been termed a "penalty," *Padilla* v. *Kentucky*, 559 U.S. 356, 365-366 (2010). But deportation "is not a punishment" for a crime and is adminis-

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[1] Contrary to respondent's assertion (Br. 55), the administrative removal provisions of 8 U.S.C. 1228(b) and 8 C.F.R. 238.1(b) do not undermine the uniformity of Executive Branch decisionmaking. In conducting those proceedings, the Department of Homeland Security is bound by decisions of the Attorney General and Board of Immigration Appeals "with respect to all questions of law." 8 U.S.C. 1103(a)(1); see 8 C.F.R. 1003.1(d)(1) and (g). Nor does this case involve the admissibility or exclusion of aliens, or forms of discretionary relief such as cancellation of removal or voluntary departure. See 8 U.S.C. 1229b and 1229c. In those settings Congress may vest the Executive with exceptionally broad authority and discretion under general statutory terms. See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982); Pet. Br. 28 n.4.

tered by the Executive through mechanisms that channel discretion and yield interpretations that control the administrative removal process and, in appropriate circumstances, call for deference by the courts. *Mahler*, 264 U.S. at 39; see *Arizona*, 132 S. Ct. at 2499; *Aguirre-Aguirre*, 526 U.S. at 425; *Carlson*, 342 U.S. at 537. Deportation therefore does not implicate the same concerns about notice and the potential for undue delegation to law enforcement and courts that can arise under a criminal statute. As this Court made clear in *Hoffman Estates*, those differences are critical in determining how the Due Process Clause applies. 455 U.S. at 498-499.

2. Contrary to respondent's argument (Br. 38-41), applying a less exacting vagueness standard to deportation provisions would not require this Court to "overrule" *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). As explained in our opening brief (at 19-20), the vagueness issue in *Jordan* "was not raised by the parties nor argued before th[e] Court." 341 U.S. at 229; cf. *Johnson*, 135 S. Ct. at 2562-2563. And because the Court concluded that the deportation provision in that case was constitutional under the standard applicable to criminal laws, it had no need to decide—and did not address—whether a less stringent standard would also be appropriate. *Id.* at 231. *Jordan* simply does not bear the weight respondent ascribes to it.

Nor does the government's position conflict with *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925) (cited at Resp. Br. 25). That case concerned a statute that imposed civil and criminal penalties on anyone who charged an "unjust or unreasonable" rate for "dealing in or with any necessaries." *Id.* at 238. This Court had held in *L. Cohen Grocery*

that the statute was void for vagueness in criminal cases, 255 U.S. at 89, and it held in *A.B. Small* that the statute was also vague in civil proceedings, 267 U.S. at 239. But the Court's explanation in the two cases was different: the Court invalidated the provision in *L. Cohen Grocery* because it failed "to inform persons * * * of the nature and cause" of the offense, 255 U.S. at 89, and invalidated the statute's application to civil proceedings in *A.B. Small* by explaining that *L. Cohen Grocery* actually found the statute completely "unintelligible" and "so vague and indefinite as really to be no rule or standard at all," 267 U.S. at 239-240 (citation omitted). Far from "*eliminating* the distinction between civil and criminal vagueness standards" (Resp. Br. 42), *A.B. Small* reflects that distinction and shows that a statute that is vague in a criminal setting may also be so "unintelligible" as to be vague in a civil one. 267 U.S. at 239-240.

Finally, there is no merit to respondent's contention (Br. 41-43) that applying a less exacting vagueness standard to Section 16(b) in civil deportation cases is inconsistent with the principle that a statute means the same thing in all its applications. See *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). The government does not contend that Section 16(b) means different things in civil and criminal cases. Nor does the government dispute the related proposition (Resp. Br. 43) that, because Section 16(b) is a provision of Title 18, the rule of lenity furnishes a mechanism for resolving ambiguities in the statutory text in both the criminal and civil contexts. See *Leocal*, 543 U.S. at 11 n.8. But that does not exclude the possibility that some applications will be constitutional while others will

not. Congress, for example, can apply grounds for deportation retroactively, see *St. Cyr*, 533 U.S. at 316-317, *Marcello*, 349 U.S. at 314, but it is prohibited by the Ex Post Facto Clause from imposing retroactive criminal liability for the same conduct, see *Peugh* v. *United States*, 133 S. Ct. 2072, 2081 (2013). So too a statute that identifies in general terms categories of aliens who are subject to deportation because their presence is contrary to the safety or welfare of society, *Mahler*, 264 U.S. at 40-41, might be void for vagueness if the same standard were applied to impose criminal punishment for primary conduct. There is nothing incongruous in treating a statute's civil and criminal applications differently for constitutional purposes, even if the operative language is the same.

B. Regardless, Section 16(b) Is Constitutional Under The Vagueness Standard Applicable To Criminal Laws

In *Johnson*, this Court identified "[t]wo features" of the ACCA's residual clause that together "conspire[d] to make it unconstitutionally vague." 135 S. Ct. at 2557. First, the residual clause created "uncertainty about how to estimate the risk posed by a crime." *Ibid.* That uncertainty arose from a combination of factors, including the requirement that courts conduct an "ordinary case" analysis and, "[c]ritically," the requirement that judges "imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-2558. Second, the residual clause created "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. That uncertainty, too, arose from several factors, including the "imprecise 'serious potential risk' standard" and the linkage between the residual clause and the ACCA's "confusing list of examples." *Id.* at 2558,

2561. The Court held that, even if the various "uncertainties in the residual clause may be tolerable in isolation," *"their sum"* made the statute vague. *Id.* at 2560 (emphasis added; citation omitted).

Rather than apply *Johnson*'s careful statutory analysis, respondent picks the parts he favors and ignores the rest. He focuses on two things that Section 16(b) and the ACCA's residual clause have in common—the need to determine the "ordinary case" of a crime and to apply a standard of risk (Br. 13-20)—and dismisses the many features they do not share as "minor differences" (Br. 9) or unimportant "textual quiddities" (Br. 21). That is not a faithful application of *Johnson*'s holding.[2]

1. Section 16(b) does not create the same "uncertainty about how to estimate the risk posed by a crime"

a. Contrary to respondent's assertion (Br. 14-17), *Johnson* did not hold that requiring courts to determine the "ordinary case" of a crime, without more, generates intolerable confusion about the risk the offense entails. 135 S. Ct. at 2557. Rather, the "[c]ritical[]" problem in *Johnson* was that the ACCA's residual clause required a court to look beyond the conduct constituting the crime and "imagine how the idealized ordinary case of the crime *subsequently plays out*," including whether the offender "might

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[2] The government's position here is not contrary to its position in *Johnson*. See Resp. Br. 1, 13. The government explained in *Johnson* that, *if* the Court were to adopt the "central objection" to the residual clause advanced by the petitioner in that case—essentially the same argument respondent makes here—then it would call Section 16(b) into question. See U.S. Supp. Br. at 22-23, *Johnson*, *supra* (No. 13-7120). The Court's decision in *Johnson* rested on different, and more limited, reasoning.

engage in violence *after*" completing the offense. *Id.* at 2557-2558 (first emphasis added). That inquiry, the Court explained, was "speculative" and "detached from statutory elements." *Id.* at 2558. As a result, courts had to envision whether the ordinary case of a crime could lead to injury at some indeterminate point in the future, leading to significant uncertainty over whether, say, drunk driving or possession of a sawed-off shotgun qualified. See *id.* at 2559; *Begay* v. *United States*, 553 U.S. 137, 156-158, 161-162 (2008) (Alito, J., dissenting).

Section 16(b) presents no such uncertainty. That section requires that an offense, "by its nature," involve a substantial risk that "physical force" may be "used in the course of committing the offense." As explained in our opening brief (at 31-38), that language mitigates the concerns underlying *Johnson*'s holding by focusing attention on the risk that physical force would be used during the commission of the crime itself, without the need to speculate about subsequent injuries that might bear a causal relationship to the crime. *Leocal*, 543 U.S. at 9; see *id.* at 10 n.7 (explaining that Section 16(b) "plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct," and distinguishing a provision of the Sentencing Guidelines identical to the ACCA's residual clause). Thus, as the Court determined in *Leocal*, Section 16(b), like the elements clause of Section 16(a), covers "a category of violent, active crimes." *Id.* at 11.

Courts conducting this analysis are faced with a much simpler task than the one they faced under the ACCA's residual clause. First, a court must identify the elements of the offense at issue. If those elements

require "the use, attempted use, or threatened use of physical force against the person or property of another," the offense qualifies as a crime of violence under Section 16(a). If the elements do not require force, but, "by [their] nature," are ordinarily accomplished through acts that pose a substantial risk of the use of physical force, then the offense qualifies under Section 16(b).

In making the latter determination, courts need only conduct a type of inquiry that they are already accustomed to performing under the categorical approach: consult the elements of the statute and the body of judicial decisions interpreting and applying those elements. See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (explaining that categorical approach "is not an invitation to apply 'legal imagination,'" and thus courts must consult judicial decisions to establish whether there is "a realistic probability, not a theoretical possibility," that certain conduct would come within statute) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); cf. *Mathis* v. *United States*, 136 S. Ct. 2243, 2256-2257 (2016) (courts may consult judicial decisions and trial records to determine whether statutory alternatives are elements or means); *Taylor* v. *United States*, 495 U.S. 575, 590-599 (1990) (surveying state statutes and judicial decisions to define "generic" burglary). That inquiry is far narrower and more concrete than the butterfly-effect analysis required by the ACCA's residual clause.

Of course, like statutes requiring a categorical approach, Section 16(b) may not always yield a precise and predictable answer. But *Leocal* provides the solution to that problem: a "lack[of] clarity" regard-

ing whether a particular crime qualifies under Section 16 should be resolved in the defendant's (or alien's) favor under ordinary principles of lenity. 543 U.S. at 11 n.8. It does not mean the statute is unconstitutionally vague.

b. Respondent's arguments to the contrary are not persuasive. He argues (Br. 16, 22-23), for example, that burglary presents a difficult case under Section 16(b) because the risk of physical force against a person may not arise until after breaking and entering is complete. But respondent ignores the fact that, unlike the ACCA, Section 16(b) requires a substantial risk that force will be used against a "person *or property*" (emphasis added). Respondent does not dispute that burglary ordinarily poses a risk of force to property.

In any event, respondent is simply wrong to assert (Br. 22-23) that "[t]he elements of generic burglary are satisfied upon unlawful entry with bad intent," making any confrontation between burglar and occupant occurring after entry "remote from the criminal act." Burglary involves "an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598 (emphasis added). A burglary thus continues throughout an intruder's unlawful presence with the requisite criminal intent, and any risk of confrontation during that period is in the course of, not after, the crime. See *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015); *United States* v. *Bonilla*, 687 F.3d 188, 192-194 (4th Cir. 2012), cert. denied, 134 S. Ct. 52 (2013); see also *People* v. *Ramirez*, 93 Cal. App. 3d 714, 726 (1979) (same for California burglary).

Indeed, this Court has identified burglary as the "classic example" of a crime that, "by its nature," fits

within Section 16(b). *Leocal*, 543 U.S. at 10; see S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (stating that Section 16(b) would cover "offenses such as burglary"). Respondent presents no reason to doubt that judgment. Instead, his real objection (Br. 14-16) is that the California burglary statute under which he was convicted might not qualify because it differs from "traditional burglary." See *Descamps* v. *United States*, 133 S. Ct. 2276, 2282 (2013) (noting that California's statute is different from "most burglary laws" because it covers authorized entries). But even if that were so, the fact that a particular state statute may not qualify as a crime of violence hardly suggests that Section 16(b) is vague.

Section 16(b) also provides greater clarity concerning the offenses it does *not* cover. Consider drunk driving. It is true, as respondent notes (Br. 27), that this Court concluded that drunk driving was not covered in both *Begay* and *Leocal*. *Begay*, however, did so only by construing the ACCA to require that residual-clause offenses be "purposeful, violent, and aggressive," 553 U.S. at 145, an extra-textual requirement that four Justices rejected and that the Court largely repudiated three years later in *Sykes* v. *United States*, 564 U.S. 1, 13 (2011). *Leocal*, in contrast, was a unanimous decision that simply followed the "ordinary or natural" meaning of Section 16(b). 543 U.S. at 10; see *id.* at 11 ("In no 'ordinary or natural' sense [does] a person risk[] having to 'use' physical force against another person in the course of operating a vehicle while intoxicated."); *id.* at 10 n.7 ("The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing

as the risk than the individual may 'use' physical force against another in committing the DUI offense.").

Respondent notes (Br. 22) that some courts have interpreted Section 16(b) to include inchoate offenses such as conspiracy and attempt, which he argues is inconsistent with requiring a substantial risk that the elements of the crime will be committed in a forceful manner. In the immigration context, however, conspiracies and attempts to commit crimes of violence under Section 16(b) are specifically included in the INA's definition of an aggravated felony. See 8 U.S.C. 1101(a)(43)(U). The only non-immigration case respondent cites focused on the risk of force during the commission of the crime itself. See *United States* v. *Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993) (attempting to aid escape of a federal prisoner "intrinsically" presents a substantial risk that force will be used "against some person or some property" during the attempt).

Respondent also cites (Br. 22) cases concerning whether solicitation offenses qualify as aggravated felonies. See *Prakash* v. *Holder*, 579 F.3d 1033, 1036-1037 (9th Cir. 2009); *Ng* v. *Attorney Gen.*, 436 F.3d 392, 397 (3d Cir. 2006). Those cases present two straightforward questions of statutory interpretation: whether solicitation comes within the INA's inchoate-offense provision, *Prakash*, 579 F.3d at 1038, and, if not, whether a risk of force arising after solicitation is complete nonetheless occurs "in the course of" the offense, *id.* at 1037. In holding that a risk of force may arise after a solicitation offense is complete, *Prakash* and *Ng* arguably misinterpreted Section 16(b)'s "in the course of" language. But that does not mean the statute is vague; at most, it merely demonstrates

the need for the clarifying construction the government has proposed, which is consistent with the ordinary and natural meaning of Section 16(b) and avoids constitutional concerns. See *Skilling* v. *United States*, 561 U.S. 358, 412 (2010).

Finally, respondent argues (Br. 25-27) that Section 16(b) is unconstitutionally vague because some courts purportedly disagree about whether physical force must be "violent" and whether reckless conduct qualifies. But neither of those issues has anything to do with the categorical risk analysis that supposedly makes Section 16(b) vague. Rather, they involve ordinary questions of statutory interpretation that would also arise under Section 16(a) (a provision equivalent to the ACCA's elements clause, which *Johnson* did "not call into question," 135 S. Ct. at 2563) and similar statutes. See *Voisine* v. *United States*, 136 S. Ct. 2272, 2279 (2016) (holding that "use * * * of physical force" in 18 U.S.C. 921(a)(33)(A) includes reckless conduct); *United States* v. *Castleman*, 134 S. Ct. 1405, 1410 (2014) (holding that "physical force" in same statute includes "offensive touching"). Respondent states no reason why resolving such questions would be any more difficult under Section 16(b) than it was in *Voisine* and *Castleman*.

2. Section 16(b) does not create the same "uncertainty about how much risk it takes for a crime to qualify" as a crime of violence

Respondent contends (Br. 17-20) that Section 16(b)'s "substantial risk" standard is no more precise than the "serious potential risk" standard contained in the ACCA's residual clause, and thus both statutes are equally vague. Respondent is incorrect.

As explained in our opening brief (at 39-40), a major problem this Court encountered in interpreting the residual clause was the textual link between the "serious potential risk" standard and the enumerated offenses (burglary, arson, extortion, and use of explosives) that preceded it. In the span of four years, the Court vacillated between construing the residual clause to require that "the risk posed by [a given offense be] comparable to that posed by its closest analog among the enumerated offenses," *James* v. *United States*, 550 U.S. 192, 203 (2007); to construing the list of offenses as "illustrat[ing] the *kinds* of crimes that fall within the [residual clause's] scope" as well as the "degree of risk posed," *Begay*, 553 U.S. at 142-143 (emphasis added); and then back again, *Sykes*, 564 U.S. at 15. See *Johnson*, 135 S. Ct. at 2558-2559. Members of this Court repeatedly noted that the enumerated offenses made it "difficult[]" to interpret the "serious potential risk" standard because those offenses were "far from clear in respect to the degree of risk each poses." *Begay*, 553 U.S. at 142-143; see *Sykes*, 564 U.S. at 29, 34 (Scalia, J., dissenting); *James*, 550 U.S. at 229 (Scalia, J., dissenting).

Johnson explained that, by tethering the "serious potential risk" standard to the "confusing list of examples," the residual clause created great uncertainty about the amount of risk required: the listed offenses were "far from clear in respect to the degree of risk each poses," and thus courts were forced to make "unpredictab[le] and arbitrar[y]" judgments about whether the ordinary case of a given offense was as risky as an enumerated one. *Id.* at 2558 (citation omitted). The Court specifically distinguished other statutes that use terms like "substantial risk" in part

because they do not "link[that] phrase * * * to a confusing list of examples." *Id.* at 2561. Although the Court in *Johnson* also distinguished statutes that apply a "substantial risk" standard to real-world conduct, *ibid.*, Justice Scalia had earlier explained that the absence of enumerated offenses was the "crucial" difference between the residual clause and "other criminal prohibitions [that] refer to the degree of risk posed by a defendant's conduct." *Sykes*, 564 U.S. at 35 (Scalia, J., dissenting) (citation omitted); cf. *United States* v. *Hill*, 832 F.3d 135, 146 (2d Cir. 2016) (noting that "the presence of the[] enumerated offenses was * * * the prime cause of uncertainty in [the residual clause] and the key obstacle to consistent judicial construction").

Respondent not only ignores this history, but attempts to rewrite it, claiming (Br. 28-29) that the enumerated offenses made the residual clause *less* vague and that their absence from Section 16(b) makes that provision *more* vague in comparison. *Johnson* refutes that argument. See 135 S. Ct. at 2561 ("The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so.") (citation omitted). So does *Leocal*, which "had little trouble interpreting" Section 16(b) "absent such a confounding list of inconsistent enumerated offenses." *Hill*, 832 F.3d at 147 n.16 (citing *Leocal*, 543 U.S. at 11).[3]

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[3] Respondent notes (Br. 28-29) that the government argued in *Johnson* that the list of enumerated offenses made the residual clause less vague. See U.S. Supp. Br. at 29-31, *Johnson*, *supra*

3. Respondent greatly overstates the difficulties in applying Section 16(b)

a. Respondent fails to show that Section 16(b) has generated anywhere near the amount of confusion that the ACCA's residual clause did. *Johnson* is the direct result of "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause," which "confirm[ed] its hopeless indeterminacy." 135 S. Ct. at 2558. By contrast, this Court has interpreted Section 16(b) only once in the statute's history and unanimously found it to be clear and capable of reasoned application. See *Leocal*, 543 U.S. at 10-11. Respondent identifies no judge in any court who expressed concern that Section 16(b) was unconstitutionally vague before *Johnson*.[4] Respondent admits (Br. 33 n.8) that the first circuit conflict identified in his brief in opposition to certiorari (at 26, concerning unauthorized use of a motor vehicle) does not exist. And despite his assertion (Br. 31) that conflicts "abound" over whether specific offenses qualify under Section 16(b), he identifies only three—none of which survives scrutiny.

First, respondent asserts (Br. 31) that two courts of appeals have held that burglary of a vehicle satisfies Section 16(b), see *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 784-785 (5th Cir. 2012) (New Mexico

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(No. 13-7120). But the Court rejected that argument, see 135 S. Ct. at 2558, and that ruling controls here.

[4] Respondent cites (Br. 34) Judge Calabresi's concurring opinion in *Vargas-Sarmiento* v. *United States Department of Justice*, 448 F.3d 159 (2d Cir. 2006), as stating that some Section 16(b) cases were "somewhat difficult to reconcile," but fails to note that Judge Calabresi found the crime at issue (New York first-degree manslaughter) to "fit[] very easily" within Section 16(b). *Id.* at 176.

offense); *United States* v. *Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (per curiam) (Texas offense), but the Ninth Circuit has disagreed, see *Sareang Ye* v. *INS*, 214 F.3d 1128, 1130 (2000) (California offense). There is no conflict. As the Ninth Circuit explained in *Sareang Ye*, the California offense of burglary of a vehicle (like burglary of a structure) is unlike similar crimes in other States because it "does not require an unprivileged or unlawful entry" and thus is less likely to involve force. 214 F.3d at 1133-1134 (noting that offender could use a borrowed key to unlock vehicle). The constitutionality of Section 16(b) does not depend on whether California's assertedly "oddball" burglary statute (Br. 19) fits within it.

Second, respondent contends (Br. 32) that five circuits disagree about whether statutory rape is a crime of violence. As with burglary of a vehicle, the decisions he cites primarily reflect differences in how States define that offense, not uncertainty over how Section 16(b) should apply. In *Valencia* v. *Gonzales*, 439 F.3d 1046 (2006), for example, the Ninth Circuit held that Section 16(b) did not cover a California statute that criminalized "consensual sexual intercourse with a minor between the ages of seventeen and eighteen." *Id.* at 1050. The court distinguished other cases, including *Chery* v. *Ashcroft*, 347 F.3d 404 (2d Cir. 2003), and *United States* v. *Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997), that involved statutes prohibiting sexual intercourse with younger children or incapacitated victims. See 439 F.3d at 1050. The other cases respondent cites are similarly offense-specific. See *Aguiar* v. *Gonzales*, 438 F.3d 86, 89-90 (1st Cir. 2006) (addressing statute prohibiting adult from having sexual inter-

course with child under age 16), cert. denied, 549 U.S. 1213 (2007); *Xiong* v. *INS*, 173 F.3d 601, 607 (7th Cir. 1999) (applying version of modified categorical approach to determine that offense involved "consensual sex between a boyfriend and his fifteen year old girlfriend," but noting that crime involving a "substantial age difference" would likely be a crime of violence); cf. *Patel* v. *Ashcroft*, 401 F.3d 400, 408-411 (6th Cir. 2005) (noting widespread agreement that various state sex offenses qualify under Section 16(b)).[5]

Third, respondent argues (Br. 32-33) that courts disagree concerning the treatment of "[e]vading arrest." He cites only two cases, however, involving very different statutes. *Dixon* v. *Attorney General*, 768 F.3d 1339 (11th Cir. 2014), concerned the Florida offense of "aggravated fleeing," which makes it a crime to cause injury to a person or damage to property while fleeing the scene of a car accident in willful disregard of an officer's command to stop. *Id.* at 1343. In *Flores-Lopez* v. *Holder*, 685 F.3d 857 (2012), in contrast, the Ninth Circuit interpreted a California statute that made it a crime to "resist[]" an officer with only a "*de minimis* [amount of] force." *Id.* at 864. Given the important differences between those offenses, it is hardly surprising (and entirely appro-

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[5] Any interpretive issues posed by statutory rape are not unique to Section 16(b). In *Esquivel-Quintana* v. *Lynch*, cert. granted, No. 16-54 (oral argument scheduled for Feb. 27, 2017), for example, this Court will consider whether certain statutory rape offenses qualify as "sexual abuse of a minor" in the INA's definition of an aggravated felony. See 8 U.S.C. 1101(a)(43)(A).

priate) that courts have reached different conclusions about whether they are covered by Section 16(b).[6]

If Section 16(b)'s categorical risk analysis were as standardless as respondent claims, he should have no trouble identifying conflicts reflecting that supposed defect. The fact that he has failed to identify a *single* genuine conflict of that sort throughout this litigation is telling—as is the fact that this Court has had cause to interpret the statute only once in 30 years. Respondent engages in a great deal of unfounded speculation about why this may be so,[7] but the answer is simple: Section 16(b) is not vague.

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[6] The National Immigration Project cites (Amicus Br. 12) another evading-arrest case, *Penuliar* v. *Mukasey*, 528 F.3d 603 (2008), but acknowledges that the Ninth Circuit later overruled it. In any event, the statute in *Penuliar* made it a crime to commit traffic violations while fleeing, not to cause injury or damage to persons or property. *Id.* at 609. Amicus also asserts circuit conflicts over residential trespass (Br. 7) and unlawful imprisonment (Br. 12-14), but neither reflects confusion over the meaning of Section 16(b). The principal divergence in the residential trespass cases was how closely the statutes at issue related to burglary. See *Zivkovic* v. *Holder*, 724 F.3d 894, 906 (7th Cir. 2013); *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1278 (10th Cir. 2003), cert. denied, 543 U.S. 986 (2004). The "unlawful imprisonment" cases involved very different types of crimes. Compare *United States* v. *Franco-Fernandez*, 511 F.3d 768, 769 (7th Cir. 2008) (concealing child from custodial parent), and *Dickson* v. *Ashcroft*, 346 F.3d 44, 47 (2d Cir. 2003) (same), with *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012) (kidnapping by force or fear).

[7] Respondent's assertion (Br. 35-36) that Section 16 does not generate many appealable decisions is wrong. Respondent cites 42 such cases in his brief, and his amici cite many more. The Ninth Circuit alone has issued dozens of decisions applying Section 16(b) since 2006. Nor does it matter (Br. 36-37) that, prior to *Johnson*, some courts looked to ACCA residual clause cases when construing Section 16(b), and vice versa. Those decisions were grounded

b. In any event, disagreements "about whether [Section 16(b)] covers this or that crime" do not indicate that the statute is vague. *Johnson*, 135 S. Ct. at 2560. "[E]ven clear laws produce close cases," *ibid.*, and this Court has consistently refused to invalidate statutes merely because "it may be difficult" to apply the statute at the margins, *United States* v. *Williams*, 553 U.S. 285, 306 (2008). See, *e.g.*, *Skilling*, 561 U.S. at 403-404 & n.36 (rejecting vagueness challenge despite circuit conflict concerning statute's scope); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 515, 526 & n.4 (1994) (same). As explained above and in our opening brief (at 41-42), many crimes clearly fall within Section 16(b)—generic burglary being a "classic example," *Leocal*, 543 U.S. at 10—and have generated no disagreement among the circuits. A criminal statute is unconstitutionally vague only if it "simply has *no* core." *Smith*, 415 U.S. at 578. That does not describe Section 16(b).

4. Invalidating Section 16(b) would call into question the constitutionality of other statutes

Respondent contends (Br. 56-58) that invalidating Section 16(b) would not affect other provisions of federal law because those statutes do not employ the categorical approach. That is incorrect. As respondent concedes (Br. 43), a statute means the same thing in all its applications, see *Clark*, 543 U.S. at 382, and thus statutes that incorporate Section 16(b)'s definition of a crime of violence also incorporate its ordinary-case requirement. See Pet. Br. 53 & n.10 (citing statutes).

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in the belief that the residual clause was as capable of reasoned application as Section 16(b). *Johnson* rejected that assumption.

Respondent focuses specifically on 18 U.S.C. 924(c)(3)(B), which is worded identically to Section 16(b), as an example of a statute that does not require a categorical approach. As explained in our certiorari-stage reply brief (at 9-10 & n.1), most circuits have rejected that argument, including after *Johnson*. See, *e.g.*, *United States* v. *Cardena*, 842 F.3d 959, 997 (7th Cir. 2016); *United States* v. *Prickett*, 839 F.3d 697, 698 (8th Cir. 2016), petition for cert. pending, No. 16-7373 (filed Jan. 3, 2017); *Hill*, 832 F.3d at 139, 146.[8]

Section 924(c) may nonetheless be distinguishable. See Pet. Br. 53 n.11. But the fundamental point here is that Section 16(b) lacks many of the ACCA residual clause's problematic features and has not generated anything close to the confusion that dogged the residual clause for years. It is not vague.

* * * * *

For the reasons stated above and in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

JANUARY 2017

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[8] Two circuit courts have suggested that Section 924(c)(3)(B) may be distinguishable, both in dicta. See *United States* v. *Robinson*, No. 15-1402, 2016 WL 7336609, at *2 n.5 (3d Cir. Dec. 19, 2016); *Shuti* v. *Lynch*, 828 F.3d 440, 449 (6th Cir. 2016).

RECORD AND BRIEF

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No. 15-1498

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

v.

JAMES GARCIA DIMAYA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Employing Separate Vagueness Standards In The Immigration And Criminal Contexts Is Arbitrary And Impractical. 3

II. Distinguishing The ACCA And § 16 Residual Clauses Would Disrupt Established Precedent That Has Long Treated The Two As Interchangeable. 8

III. The Government Exaggerates The Practical Consequences Of Invalidating The § 16 Residual Clause. 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Page

Aguiar v. Gonzales,
438 F.3d 86 (1st Cir. 2006) 12
Arellano Hernandez v. Lynch,
831 F.3d 1127 (9th Cir. 2016) 14
Bazan-Reyes v. INS,
256 F.3d 600 (7th Cir. 2001) 9
Begay v. United States,
553 U.S. 137 (2008) 12
Blake v. Gonzales,
481 F.3d 152 (2d Cir. 2007) 12
Chue Xiong v. INS,
173 F.3d 601 (7th Cir. 1999) 11
Delgado-Hernandez v. Holder,
697 F.3d 1125 (9th Cir. 2012) 12
Garcia v. INS,
237 F.3d 1216 (10th Cir. 2001) 12
Hill v. United States,
827 F.3d 560 (7th Cir. 2016) 14
Jimenez-Gonzalez v. Mukasey,
548 F.3d 557 (7th Cir. 2008) 12
Johnson v. United States,
135 S. Ct. 2551 (2015) 9
Leocal v. Ashcroft,
543 U.S. 1 (2004) 8
Padilla v. Kentucky,
559 U.S. 356 (2010) 6
Reyes-Soto v. Lynch,
808 F.3d 369 (8th Cir. 2015) 14
Roberts v. Holder,
745 F.3d 928 (8th Cir. 2014) 11, 14
Rodriguez-Castellon v. Holder,
733 F.3d 847 (9th Cir. 2013) 11, 12

TABLE OF AUTHORITIES--continued

Page

Royce v. Hahn,
151 F.3d 116 (3d Cir. 1998) 11
United States v. Abraham,
386 F.3d 1033 (11th Cir. 2004) 12
United States v. Cabrera-Perez,
751 F.3d 1000 (9th Cir. 2014) 14
United States v. Camacho-Lopez,
450 F.3d 928 (9th Cir. 2006) 4
United States v. Carrasco-Tercero,
745 F.3d 192 (5th Cir. 2014) 14
United States v. Chapa-Garza,
243 F.3d 921 (5th Cir. 2001) 9
United States v. Collins,
811 F.3d 63 (1st Cir.) 14
United States v. Colon-Arreola,
753 F.3d 841 (9th Cir. 2014) 14
United States v. Dawn,
685 F.3d 790 (8th Cir. 2012) 9
United States v. Duncan,
833 F.3d 751 (7th Cir. 2016) 14
United States v. Elliott,
757 F.3d 492 (6th Cir. 2014) 14
United States v. Evans,
478 F.3d 1332 (11th Cir. 2007) 12
United States v. Fields,
823 F.3d 20 (1st Cir. 2016) 14
United States v. Garcia-Figueroa,
753 F.3d 179 (5th Cir. 2014) 14
United States v. Gomez-Leon,
545 F.3d 777 (9th Cir. 2008) 12
United States v. Gosling,
39 F.3d 1140 (10th Cir. 1994) 11
United States v. Herrera-Alvarez,
753 F.3d 132 (5th Cir. 2014) 14

TABLE OF AUTHORITIES--continued

Page

United States v. Houston,
364 F.3d 243 (5th Cir. 2004) 12
United States v. Howell,
838 F.3d 489 (5th Cir. 2016) 14
United States v. Hull,
456 F.3d 133 (3d Cir. 2006) 9
United States v. Kirk,
111 F.3d 390 (5th Cir. 1997) 11
United States v. Maid,
772 F.3d 1118 (8th Cir. 2014) 14
United States v. Maldonado-Palma,
839 F.3d 1244 (10th Cir. 2016) 14
United States v. Mendoza-Lopez,
481 U.S. 828 (1987) 4
United States v. Mitchell,
743 F.3d 1054 (6th Cir. 2014) 14
United States v. Ovalle-Chun,
815 F.3d 222 (5th Cir. 2016) 14
United States v. Seabrooks,
839 F.3d 1326 (11th Cir. 2016) 14
United States v. Segovia,
770 F.3d 351 (5th Cir. 2014) 14
United States v. Stout,
706 F.3d 704 (6th Cir. 2013) 12
United States v. Thomas,
838 F.3d 926 (8th Cir. 2016) 14
United States v. Velazquez-Overa,
100 F.3d 418 (5th Cir. 1996) 11-12
United States v. Waters,
823 F.3d 1062 (7th Cir. 2016) 14
Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) 1
Yates v. United States,
2016 WL 7030342 (7th Cir. Dec. 2, 2016) 14

TABLE OF AUTHORITIES--continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 1

STATUTES

8 U.S.C. § 1324(a)(2)(A) 6
8 U.S.C. § 1326 4
8 U.S.C. § 1326(b), (b)(1), (2) 5
8 U.S.C. § 1326(d) 4, 5, 7
8 U.S.C. § 1327 ..... 5, 7
18 U.S.C. § 16 ..... *passim*
18 U.S.C. § 25(a)(1) 16
18 U.S.C. § 119(b)(3) 16
18 U.S.C. § 842(p)(2) 16
18 U.S.C. § 844(o) 16
18 U.S.C. § 924(c), (c)(3)(B) 13, 15, 16
18 U.S.C. § 924(e)(2)(B)(ii) (ACCA) ..... *passim*
18 U.S.C. § 929(a)(1) 16
18 U.S.C. § 931(a)(1) 16
18 U.S.C. § 1028(b)(3)(B) 16
18 U.S.C. § 1039(e)(1) 16
18 U.S.C. § 1952(a) 16
18 U.S.C. § 1956(c)(7)(B)(ii) 16
18 U.S.C. § 1959(a)(4) 16
18 U.S.C. § 2250(c) 16
18 U.S.C. § 2261(a) 16
18 U.S.C. § 3006A 1
18 U.S.C. § 3142(f) 16
18 U.S.C. § 3181(b)(1) 16
18 U.S.C. § 3559(f) 16
18 U.S.C. § 3561(b) 16
18 U.S.C. § 3663A(c)(1)(A)(i) 16
18 U.S.C. § 4042(b)(3)(B) 16

TABLE OF AUTHORITIES--continued

Page

OTHER

"Immigration Prosecutions for August 2016," TRACImmigration, *available at* http://trac.syr.edu/ tracreports/bulletins/ immigration/monthlyaug16/fil/ 4

Petition for Rehearing for the United States of America v. Chapa-Garza, 2001 WL 34713050 (5th Cir. Apr. 13, 2001) 10

Representing Immigrant Defendants in New York, Immigrant Defense Project, 5th Ed. January 2011 6

U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, Table 2 (2014), http://www.ussc.gov/sites/default/ files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table02.pdf 16

U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics 2

U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, Table 2 (2015), http://www.ussc.gov/sites/default/ files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table02.pdf 16

U.S. Sentencing Guidelines Manual app. C 10

U.S. Sentencing Guidelines Manual § 4B1.2, 2(a)(2) 9, 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Given that 18 U.S.C. § 16(b) has both immigration and criminal applications, *amicus* has particular expertise and interest in the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his brief, Respondent James Garcia Dimaya urges the Court to hold that *Johnson v. United States*, 135 S. Ct. 2251 (2015), a case striking down the "residual clause" of the Armed Career Criminal Act (ACCA) as unconstitutionally vague, applies equally to the similarly-worded "residual clause" in 18 U.S.C. § 16(b). Resp. Br. 10-20. Mr. Dimaya contends that the Court

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

of Appeals applied the proper void-for-vagueness standard and that the minor textual differences in the ACCA and § 16 residual clauses are immaterial and, if anything, only compound the latter's vagueness. Resp. Br. 16-20, 37-59.

Amicus National Association of Federal Defenders agrees with Mr. Dimaya that the § 16 residual clause is void for vagueness and does not endeavor to repeat his arguments here. Instead, *amicus* writes to address several of the government's points in light of federal defenders' experience at the forefront of criminal and immigration law. Immigration-related crimes now comprise 29.3 percent of federal prosecutions, exceeded only by drug crimes at 31.8 percent.[2] Having navigated the intersection of federal criminal and immigration codes for decades, as well as issues surrounding the Court's decision in *Johnson*, *amicus* is well-positioned to weigh in on the constitutionality of the § 16 residual clause, a statute with both criminal and immigration applications that lies at the heart of this case.

In *amicus'* opinion, the government's attempt to salvage the § 16 residual clause in the wake of *Johnson* fails, both as a legal and practical matter. First, the government's proposed dual vagueness standards for immigration and criminal proceedings are arbitrary and impractical given the inextricable connection between the two contexts. Second, the government's attempt to distinguish the § 16 residual clause from the ACCA residual clause would unsettle decades of precedent treating the two provisions as interchangeable. Finally, the government exaggerates the practical effect of applying *Johnson* to the § 16

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[2] U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, fig. A.

residual clause, overstating the impact of such a holding on other federal criminal statutes and ignoring the alternative "crime of violence" definition under § 16(a) that remains intact post-*Johnson*. For these reasons, the Court should declare the § 16 residual clause unconstitutionally vague.

ARGUMENT

I. Employing Separate Vagueness Standards In The Immigration And Criminal Contexts Is Arbitrary and Impractical.

While the government acknowledges that the § 16 residual clause has a "range of criminal and immigration applications," it nevertheless urges the Court to create a two-tiered vagueness test that changes the applicable constitutional standard based on whether an individual finds herself in immigration or criminal proceedings at any given moment. Pet. Br. 27, 45-46. For criminal proceedings, the government advocates the traditional standard that a statute must "give ordinary people fair notice of the conduct it punishes." Pet. Br. 21. But for immigration proceedings, the government advocates that a provision be struck down as unconstitutionally vague only where it is "so unintelligible as to effectively supply no standard at all." Pet. Br. 10-11, 21. This dual standard "makes sense," the government claims, given the "special nature of removal proceedings" and "the basic purposes of the vagueness doctrine." Pet. Br. 13, 25.

The government's proposed bifurcation of the vagueness standard relies on the premise that immigration and criminal proceedings function independently from one another, like parallel sets of train tracks. This is not accurate. Rather, the current criminal and immigration codes are a tangled web of

interlocking and cross-referencing provisions that would be rendered even more confusing and difficult to navigate under the government's suggested framework.

Take, for instance, the crime of illegally reentering the United States after a prior removal under 8 U.S.C. § 1326—the most commonly-charged immigration offense in federal district courts today, with 1,241 prosecutions in August 2016 alone.[3] In *United States v. Mendoza-Lopez*, this Court held that noncitizens charged with illegal reentry may challenge the government's use of a deportation order to satisfy an element of the offense when that deportation order did not comport with due process. 481 U.S. 828 (1987); see also 8 U.S.C. § 1326(d) (creating a statutory basis to challenge invalid civil administrative proceedings used as an element of a crime). As a result, a noncitizen who is deported, reenters the United States, and is subsequently apprehended and criminally prosecuted for this reentry may move to dismiss the indictment on the ground that her underlying administrative proceeding did not comport with due process. See, *e.g.*, *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (granting noncitizen's motion to dismiss the indictment where he was improperly removed as an aggravated felon). Such challenges are common, particularly in districts along the southwestern border with high rates of illegal reentry prosecution.

The government's dual vagueness standards would draw an arbitrary distinction between applications of the same statute, and lead to absurd results. If a

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[3] See "Immigration Prosecutions for August 2016," TRACImmigration, *available at*: http://trac.syr.edu/ tracreports/ bulletins/immigration/monthlyaug16/fil/.

noncitizen were convicted of a crime and placed in removal proceedings, the immigration judge would apply the "unintelligible" standard to determine whether an offense satisfying the § 16 residual clause could qualify as an aggravated felony and trigger her removal. But if the same person illegally reentered the United States one week later, the less demanding "fair notice" standard would govern the criminal proceedings—and, presumably, any motion to dismiss the indictment under § 1326(d). Thus, the same removal order that was valid for immigration purposes would *not* be valid for purposes of satisfying an element of the criminal offense, even though both relied on the identical aggravated felony statute and underlying crime.

Similarly, Congress created an incremental punishment framework that ties the maximum statutory sentence for an illegal reentry conviction to the noncitizen's criminal history. See 8 U.S.C. § 1326(b). Under this framework, noncitizens previously convicted of an ordinary felony face a maximum sentence of ten years in prison, while noncitizens convicted of an aggravated felony face a maximum of twenty years. See 8 U.S.C. § 1326(b)(1) and (2). As with the § 1326(d) motion, a federal district court would presumably apply the less demanding "fair notice" standard to determine an individual's maximum criminal sentence, even though officials had previously applied the more demanding "unintelligible" standard to the very same conviction and statute during removal proceedings.

The Immigration and Nationality Act also created the crime of aiding or assisting a noncitizen convicted of an aggravated felony to illegally enter the United States, an offense carrying a ten-year maximum penalty. See 8 U.S.C. § 1327. By contrast, a person

convicted of bringing a noncitizen *not* convicted of an aggravated felony to the United States through a port of entry would face a maximum penalty of one year of incarceration. See 8 U.S.C. § 1324(a)(2)(A). Were the government's dual vagueness standards to apply, a noncitizen could be removed on the basis of a crime that passed constitutional muster as an aggravated felony under the "unintelligible" standard—yet a person prosecuted for bringing that same noncitizen to the United States one week later might not have aided the entry of a noncitizen "convicted of an aggravated felony" under the "fair notice" standard. This is a recipe for arbitrariness and confusion.

The government's vagueness tiers would also complicate the responsibilities of criminal defense attorneys, who are ethically and constitutionally bound to advise their clients of the immigration consequences of criminal convictions. See *Padilla v. Kentucky*, 559 U.S. 356 (2010). Under *Padilla*, a criminal defense attorney representing a noncitizen must, at a minimum, "read[] the text" of the Immigration and Nationality Act and advise the client whether his guilty plea renders his removal "presumptively mandatory" as an aggravated felony. *Id.* at 368-69. But that same criminal defense attorney should also advise his client of the potential criminal penalties for illegal reentry triggered by the offense. See *Representing Immigrant Defendants in New York*, Immigrant Defense Project, 5th Ed. January 2011, section 3.5.D, p. 58 (recommending that defense attorneys advise clients on the criminal penalties for illegal reentry). In other words, a defense lawyer must explain to a client (who may have little education, limited English proficiency, and almost no understanding of legal complexities) why a particular crime would subject him to mandatory *removal* as an

aggravated felon in immigration proceedings, but not *criminal sanctions* as an aggravated felon in an illegal reentry prosecution.

A simple example shows the absurdities that would arise under the government's dual vagueness standards. Imagine that at the time of his original burglary charge, Mr. Dimaya's criminal defense attorney advised him that, because the § 16 residual clause is not void for vagueness under an "unintelligible" standard, a plea to his offense would be an aggravated felony and lead to his mandatory deportation. But the defense attorney then advised Mr. Dimaya that the same offense would *not* be an aggravated felony under the "fair notice" standard for criminal sentencing purposes if he were deported and illegally reentered. Confused and fearful, Mr. Dimaya decides to go to trial. A jury convicts him, and he is removed from the United States.

In an attempt to return to the United States, Mr. Dimaya asks his mother to drive him across the border and presents his brother's passport at the port of entry. Federal authorities are not fooled; he is arrested and prosecuted for illegal reentry. Given that the removal order is now an element of a crime, the federal judge applies the "fair notice" standard to the adjudication of his motion to dismiss the indictment under § 1326(d) and at his sentencing proceedings. But immediately after criminal proceedings conclude, immigration officials invoke the "unintelligible" standard to again remove Mr. Dimaya from the United States. Meanwhile, his mother is prosecuted under § 1327 for aiding and abetting an aggravated felon to enter the United States. But given the pure criminal nature of the mother's proceedings, the same judge applies the "fair notice" standard to conclude that Mr. Dimaya's crime is not an aggravated felony such

that his mother faces a maximum sentence of one year in prison, rather than ten years.

As this illustration demonstrates, criminal and immigration proceedings do not follow a linear, parallel trajectory; rather, they overlap and intertwine, not infrequently in the same proceeding. To apply different standards in these contexts would create a pointless distinction and needlessly confuse courts, attorneys, and defendants alike. Because the government's proposed bifurcated vagueness standard would be impractical and illogical, the Court should continue to apply the traditional "fair notice" standard in both criminal and immigration proceedings.

II. Distinguishing The ACCA And § 16 Residual Clauses Would Disrupt Established Precedent That Has Long Treated The Two As Interchangeable.

The government also argues that the § 16 residual clause "focuses on a more sharply defined category of risk" than the ACCA residual clause. Pet. Br. 12. Relying largely on a footnote in *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.9 (2004), the government attempts to distinguish the "risk of force" language in the § 16 residual clause from the "risk of injury" language in the ACCA residual clause, arguing that the latter sweeps more broadly than the former. Pet. Br. 12. Thus, the government claims, "hard cases under the ACCA's residual clause are easier cases under Section 16(b)." Pet. Br. 32.

As an initial matter, the Court should be skeptical of the government's position because it represents a marked turn from the government's position in the past. As Mr. Dimaya's brief notes, the government conceded during *Johnson* litigation that the § 16 residual clause "is equally susceptible to petitioner's

central objection to the [ACCA] residual clause." Supp. Br. for the U.S. 22-23, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120). And long before *Johnson*, the government had urged courts to equate the § 16 residual clause with the ACCA residual clause. See, *e.g.*, *Bazan-Reyes v. I.N.S.*, 256 F.3d 600, 609 (7th Cir. 2001) (noting the government's assertion that prior ACCA precedent "require[d]" the court to find that the offense also satisfied the § 16 residual clause, which is "substantially similar" to ACCA and "aimed at the same type of risky or reckless behavior"); *United States v. Hull*, 456 F.3d 133, 140–41 (3d Cir. 2006) (noting in a "risk of force" case that "[t]he Government suggests that we look to cases interpreting U.S.S.G. § 4B1.2[4] for guidance"); *United States v. Chapa-Garza*, 243 F.3d 921, 925 (5th Cir. 2001) ("The government urges that we interpret section 16(b) the same way the Seventh Circuit interpreted U.S.S.G. § 4B1.2(a)(2).").

In fact, the government's position equating the § 16 and ACCA residual clauses dates back to the Sentencing Commission's 1989 decision to amend the career offender definition to require an ACCA-like "risk of injury," rather than a § 16(b)-like "risk of force." See U.S. Sentencing Guidelines Manual

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[4] The career offender enhancement in the United States Sentencing Guidelines ("U.S.S.G.") contains identical language to the ACCA residual clause. See U.S.S.G. § 4B1.2(a)(2) (defining as a "crime of violence" an offense involving conduct that "presents a serious potential risk of physical injury"); 18 U.S.C. § 924(e)(2)(B)(ii) (same). Because courts have treated these provisions as identical to one another, *amicus* includes examples of § 4B1.2(a)(2) cases in this section. See, *e.g.*, *United States v. Dawn*, 685 F.3d 790, 800 n.5 (8th Cir. 2012) ("We interpret the term violent felony in 18 U.S.C. § 924(e) in the same manner that we interpret the term crime of violence in U.S.S.G. § 4B1.2.") (quotations and alterations omitted)).

Appendix C, Amendment 268 (1989). In this Amendment, the Sentencing Commission explained that the new language was derived from the ACCA residual clause and designed only to "clarify" the "crime of violence" definition.[5] *Id.* Relying on this Amendment, the government argued that § 16 residual clause precedent applied in U.S.S.G. § 4B1.2 cases, claiming that the amendment "did not evince an intent to change its meaning" but was "only intended to 'clarify the definition[] of crime of violence.'" Petition for Rehearing for the United States of America v. Chapa-Garza, 2001 WL 34713050 (5th Cir. Apr. 13, 2001 (quoting Amendment 268 and again arguing that prior "risk of injury" precedent "requires" a finding that the offense satisfy the § 16(b) residual clause); see also *Bazan-Reyes*, 256 F.3d at 609 (observing that the government "points out that the Sentencing Commission . . . noted that the amendment was not intended to change the substance of the guideline, but only to clarify the language"). Given the government's historic advocacy of treating the two residual clauses as interchangeable, its newfound position should be viewed with skepticism. See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.") (internal quotation marks and citation omitted).

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[5] The Sentencing Commission's "clarification" further supports the conclusion that the ACCA and § 16 residual clauses suffer from the same defect, for if the "risk of injury" language was meant to "clarify" the "risk of force" language, the latter could hardly have been seen as *more* "sharply defined" than the former. Pet. Br. 12.

Following the government's lead, the Courts of Appeals have frequently concluded that the "small differences in language" between the ACCA and § 16 residual clauses are not "critical." *Xiong v. INS*, 173 F.3d 601, 606 n.2 (7th Cir. 1999). See also *Royce v. Hahn*, 151 F.3d 116, 120 (3d Cir. 1998) (stating that the provisions "differ only in minor detail"); *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (describing the definitions as "substantially similar"); *Roberts v. Holder*, 745 F.3d 928, 930 (8th Cir. 2014) (finding the terms "virtually identical"). As a result, many courts have relied on precedent interpreting one residual clause to construe the other. See *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997) (holding that "the reasoning employed in § 16 cases is persuasive authority" for career offender Guidelines cases); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 863 n.7 (9th Cir. 2013) (observing that "courts have frequently relied on opinions analyzing [the "physical injury" clause] in considering whether a state crime constitutes a 'crime of violence' for purposes of § 16(b)").

If the risk of physical injury always swept more broadly than the risk of physical force, as the government claims (Pet. Br. 32), then one could perhaps expect courts to use § 16 residual clause cases to decide ACCA residual clause cases but not the opposite. Yet courts have not treated "crime of violence" precedent as a one-way street; rather, they have frequently relied on cases involving the purportedly "broader" ACCA residual clause to decide cases involving the purportedly "narrower" § 16 residual clause. See, *e.g.*, *United States v. Velazquez-Overa*, 100 F.3d 418, 421-22 (5th Cir. 1996) (relying on ACCA and career offender cases to find that taking indecent liberties with a child under Tex. Penal Code

Ann. § 21.11 satisfies § 16(b)); *Tapia Garcia v. I.N.S.*, 237 F.3d 1216, 1222–23 (10th Cir. 2001) (relying on career offender cases to find Idaho DUI an aggravated felony under § 16(b)); *United States v. Abraham*, 386 F.3d 1033, 1038 (11th Cir. 2004) (relying on career offender case to find federal kidnapping a "crime of violence" under language identical to § 16(b)); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127–28 (9th Cir. 2012) (relying on career offender case to find kidnapping under Cal. Penal Code § 207 an aggravated felony under § 16(b)); *United States v. Stout*, 706 F.3d 704, 708-09 (6th Cir. 2013) (relying on ACCA and career offender cases to find that escape under Ky. Rev. Stat. § 520.030 satisfied § 16(b)); *Rodriguez-Castellon*, 733 F.3d at 863 n.7 (relying on career offender cases to find lewd and lascivious acts with a 14 or 15 year-old satisfied § 16(b)).[6]

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[6] It is true that some courts have distinguished the ACCA and § 16 residual clauses. See, *e.g.*, *Aguiar v. Gonzales*, 438 F.3d 86, 88 (1st Cir. 2006); *United States v. Evans*, 478 F.3d 1332, 1343 (11th Cir. 2007); *Blake v. Gonzales*, 481 F.3d 152, 162 (2d Cir. 2007); *United States v. Houston*, 364 F.3d 243, 248 n.5 (5th Cir. 2004). But these cases all pre-date the Court's decision in *Begay v. United States*, which held that the ACCA residual clause requires more than mere injury; it requires an offense that necessarily involves "purposeful, violent, and aggressive conduct." 553 U.S. 137, 145 (2008). After *Begay*, at least one court has admitted that "it is unclear whether there is any meaningful difference between the two risk-based approaches." *United States v. Gomez-Leon*, 545 F.3d 777, 789 (9th Cir. 2008). So while the government relies heavily on *Leocal*'s purported distinction between "risk of force" and "risk of injury" cases, Pet. Br. 37-38, it is doubtful that any such a distinction survives *Begay*. See *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) ("Despite the slightly different definitions, the Supreme Court's holding in *Begay* perfectly mirrored the analysis in *Leocal* regarding whether drunk driving was a crime of violence under Section 16(b).").

Were the Court to now provide different definitions for these provisions that have long been intertwined, the validity of every case that presumed their equivalence (and the validity of every case that relied on each of those cases) would be called into question. Lawyers and judges could no longer look to decades of well-developed case law to determine whether a § 16 residual clause offense qualified as a "crime of violence," because any case that could be traced back to reliance on the ACCA residual clause would be suspect. To prevent this unraveling of long-established precedent that has treated the ACCA and § 16 residual clauses as interchangeable, the Court should decline the government's invitation to distinguish the two.

III. The Government Exaggerates The Practical Consequences Of Invalidating The § 16 Residual Clause.

Finally, the government claims that invalidating the § 16 residual clause would have "deleterious consequences for both criminal justice and immigration enforcement." Pet. Br. 53. Specifically, the government lists nineteen federal criminal statutes that cross-reference the "crime of violence" definition, implying that a limitation on the scope of these statutes would substantially affect its ability to prosecute dangerous conduct if the Court were to rule in Mr. Dimaya's favor. Pet. Br. 53. With one qualification, the government also suggests that invalidating the § 16 residual clause would impact the "materially identical" definition of a "crime of violence" appearing in § 924(c), allowing "many prisoners with long-final convictions" under these provisions to conceivably seek collateral relief. Pet. Br. 53-54.

The government's concerns are exaggerated because the § 16 "crime of violence" definition will still sweep within it any offense that has as an element the "use,

attempted use, or threatened use of physical force against the person or property of another"—a definition that all parties agree will remain untouched by the Court's decision here. See 18 U.S.C. § 16(a); Pet. Br. 51; Resp. Br. 58. Since 2014, courts have relied on this "use of force" definition to find a variety of state assault, battery, aggravated menacing, criminal threats, and robbery offenses "crimes of violence."[7]

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[7] See, *e.g.*, *Yates v. United States*, __ F.3d __, 2016 WL 7030342, at *1 (7th Cir. Dec. 2, 2016) (battery by a prisoner under Wis. Stat. § 940.20(1)); *United States v. Seabrooks*, 839 F.3d 1326, 1338 (11th Cir. 2016) (armed robbery under Fla. Stat. § 812.13); *United States v. Maldonado-Palma*, 839 F.3d 1244, 1249 (10th Cir. 2016) (aggravated assault with a deadly weapon under N.M. Stat. Ann. § 30–3–2(A)); *United States v. Howell*, 838 F.3d 489, 490 (5th Cir. 2016) (family-violence assault by strangulation under Texas Penal Code § 22.01(a)(1), (b)(2)(B)); *United States v. Duncan*, 833 F.3d 751, 752 (7th Cir. 2016) (robbery under Indiana Code § 35–42–5–1); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1129 (9th Cir. 2016) (attempted criminal threats under Cal. Penal Code § 422); *Hill v. United States*, 827 F.3d 560, 561 (7th Cir. 2016) (Illinois attempted murder and aggravated discharge of a firearm under 720 ILCS 5/8–4(a) and 720 ILCS 5/24–1.2(a)); *United States v. Waters*, 823 F.3d 1062, 1064 (7th Cir. 2016) (Illinois domestic battery under § 5/12-3.2(a)(1)); *United States v. Fields*, 823 F.3d 20, 34 (1st Cir. 2016) (assault with a deadly weapon under Mass. Gen. Laws ch. 265, § 15B(b)); *United States v. Thomas*, 838 F.3d 926, 929 (8th Cir. 2016) (first-degree battery under Arkansas Code § 5–13–201(a)(1)); *United States v. Ovalle-Chun*, 815 F.3d 222, 224 (5th Cir. 2016) (Delaware aggravated menacing); *United States v. Collins*, 811 F.3d 63, 66 (1st Cir.), *cert. denied*, 136 S. Ct. 2397, 195 L. Ed. 2d 769 (2016) (Maine criminal threatening with a deadly weapon under 17–A M.R.S. § 209(1)); *Reyes-Soto v. Lynch*, 808 F.3d 369, 370 (8th Cir. 2015) (South Carolina pointing a firearm under § 16–23–410); *United States v. Maid*, 772 F.3d 1118, 1120 (8th Cir. 2014) (assault while displaying a dangerous weapon under Iowa Code §§ 708.1(3), 708.2(3)); *United States v. Segovia*, 770 F.3d 351, 355 (5th Cir. 2014) (Maryland robbery with a dangerous and deadly weapon); *United States v. Elliott*,

Thus, a decision in Mr. Dimaya's favor will not gut § 16 or allow violent offenders to go unpunished, as any crime that has as an element the "use, attempted use, or threatened use of force" will continue to trigger the same criminal sanctions it always has.

The government also warns that the decision in this case may impact the "materially indistinguishable" residual clause in 18 U.S.C. § 924(c)(3)(B), although it suggests that § 924(c) cases might be distinguished on the basis that they contain "a specified nexus to the use, carrying, or possession of a firearm." Pet. Br. 53-45, 53 n.11. Likewise, Mr. Dimaya's brief notes that one Court of Appeals has distinguished § 16 and § 924(c) on the basis that the latter applies to a "crime of violence" that occurs as part of the instant offense, rather than a past conviction. Resp. Br. 56. While *amicus* does not believe that the two statutes are distinguishable, it agrees with both parties that the

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757 F.3d 492, 495 (6th Cir. 2014) (Kentucky facilitation to commit robbery under Ky. Rev. Stat. Ann. § 506.080 and Ky. Rev. Stat. Ann. § 515.020); *United States v. Colon-Arreola*, 753 F.3d 841, 844 (9th Cir. 2014) (battery of a peace officer under Cal. Penal Code § 243(c)(2)); *United States v. Garcia-Figueroa*, 753 F.3d 179, 183 (5th Cir. 2014) (attempted aggravated battery on a law enforcement officer with a law enforcement officer's firearm under Florida Statute §§ 784.07, 777.04, and 775.0875); *United States v. Herrera-Alvarez*, 753 F.3d 132, 134 (5th Cir. 2014) (aggravated battery under Louisiana Revised Statutes § 14:34); *United States v. Cabrera-Perez*, 751 F.3d 1000, 1002 (9th Cir. 2014) (aggravated assault under Ariz. Rev. Stat. § 13–1203(A)(2)); *Roberts v. Holder*, 745 F.3d 928, 929 (8th Cir. 2014) (third-degree assault under Minnesota Statutes Annotated § 605.223(1)); *United States v. Carrasco-Tercero*, 745 F.3d 192, 199 (5th Cir. 2014) (New Mexico aggravated assault under N.M. Stat. Ann.. § 30–3–2); *United States v. Mitchell*, 743 F.3d 1054, 1057 (6th Cir. 2014) (Tennessee robbery under Tenn. Code Ann. § 39–2–501(a)).

constitutional validity of § 924(c)(3)(B) is not within the scope of the question presented here and need not be resolved by the Court at this time. Pet. Br. 53 n.11; Resp. Br. 56.

Finally, the government's reference to nineteen other statutes that would be impacted by a finding of unconstitutional vagueness overstates the impact this holding would have on federal criminal practice. Analyzing data from the U.S. Sentencing Commission,[8] *amicus* could find no convictions in 2014 or 2015 under at least twelve of the nineteen statutory subsections the government lists, and the remaining seven subsections garnered a collective total of only 49 convictions during those two years.[9] Those 49 convictions represent approximately .03 percent of all federal convictions that occurred during 2014 and 2015.[10] In other words, convictions under these

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[8] This data was extracted from the U.S. Sentencing Commission's Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project. Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission.

[9] See 18 U.S.C. § 841(o) (five convictions); 18 U.S.C. § 1028(b)(3)(B) (none); 18 U.S.C. § 4042(b)(3)(B) (none); 18 U.S.C. § 25(a)(1) (none); 18 U.S.C. § 119(b)(3) (none); 18 U.S.C. § 931(a)(1) (five convictions); 18 U.S.C. § 1956(c)(7)(B)(ii) (none); 18 U.S.C. § 3181(b)(1) (none); 18 U.S.C. § 3663A(c)(1)(A)(i) (none); 18 U.S.C. § 842(p)(2) (none); 18 U.S.C. § 929(a)(1) (none); 18 U.S.C. § 1039(e)(1) (none); 18 U.S.C. § 1952(a) (four convictions); 18 U.S.C. § 1959(a)(4) (three convictions); 18 U.S.C. § 2250(c) (one conviction); 18 U.S.C. § 2261(a) (22 convictions); 18 U.S.C. § 3142(f) (none); 18 U.S.C. § 3559(f) (nine convictions); 18 U.S.C. § 3561(b) (none).

[10] See U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, Table 2 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table02.pdf (71,003 Guideline offenders in FY 2015); U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, Table 2 (2014),

nineteen statutes are uncommon, and their absence would not meaningfully affect the government's ability to prosecute violent offenders.

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http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table02.pdf (75,836 Guideline offenders in FY 2014).

CONCLUSION

Because the government's position would create arbitrary vagueness standards for criminal and immigration proceedings, unsettle established precedent treating the ACCA and § 16 residual clauses as interchangeable, and have little effect on the government's ability to prosecute violent conduct, *amicus curiae* asks the Court to affirm the Court of Appeals' decision holding the § 16 residual clause void for vagueness.

Respectfully submitted,

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No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH,
ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

JAMES GARCIA DIMAYA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRATION LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

THE VOID-FOR-VAGUENESS DOCTRINE APPLIES TO THE DEPORTATION LAW AT ISSUE HERE. 3

A. This Court has held the vagueness doctrine applicable to deportation statutes. 3

B. Deportation based on a criminal law violation is subject to the vagueness standard applicable to criminal laws, because it has the characteristics that trigger that strict vagueness review. 6

1. Strict vagueness analysis applies to civil laws that serve the purposes of criminal punishment or that implicate an individual's right to liberty. 7

2. Crime-based deportation is a uniquely severe penalty that serves the purposes of criminal punishment and threatens the individual's liberty. 10

3. The Court should reject the government's label-based approach to vagueness analysis. 15

C. Vagueness Review Vindicates The Due Process Protections Of Fair Notice And Non-Arbitrary Enforcement, Which Are Critically Important For Noncitizens Facing Deportation. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

A.B. Small Co. v. *American Sugar Refining Co.*, 267 U.S. 233 (1925) 17

Advance Pharm., Inc. v. *United States*, 391 F.3d 377 (2d Cir. 2004) 17

Alphonsus v. *Holder*, 705 F.3d 1031 (9th Cir. 2013 6

Aptheker v. *Sec'y of State*, 378 U.S. 500 (1964) 9

Arriaga v. *Mukasey*, 521 F.3d 219 (2d Cir. 2008) 6

Baptiste v. *Attorney General*, 841 F.3d 601 (3d Cir. 2016) 6

Beslic v. *INS*, 265 F.3d 568 (7th Cir. 2001) 6

Boutilier v. *INS*, 387 U.S. 118 (1967) 4, 5

Bridges v. *Wixon*, 326 U.S. 135 (1945) 2, 10, 14

Calder v. *Bull*, 3 U.S. 386 (1798) 20

Champlin Ref. Co. v. *Corp. Comm'n*, 286 U.S. 210 (1932) 8

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 9

Clinical Leasing Serv., 925 F.2d 120 (5th Cir. 1991) 17

Cases—continued

Ewing v. *California*,
538 U.S. 11 (2003) 8

Fiswick v. *United States*,
329 U.S. 211 (1946) 11

Fong Haw Tan v. *Phelan*,
333 U.S. 6 (1948) 4

Fong Yue Ting v. *United States*,
149 U.S. 698 (1893) 11, 15

Galvan v. *Press*,
347 U.S. 522 (1954) 19, 20

Gen. Media Commc'ns, Inc. v. *Cohen*,
131 F.3d 273 (2d Cir. 1997) 9

Giaccio v. *Pennsylvania*,
382 U.S. 399 (1966) 17

INS v. *St. Cyr*,
533 U.S. 289 (2001) 12

Johnson v. *United States*,
135 S. Ct. 2551 (2015) 1, 19

Jordan v. *De George*,
341 U.S. 223 (1951) ..... *passim*

Kansas v. *Hendricks*,
521 U.S. 346 (1997) 8

Lehmann v. *Carson*,
353 U.S. 685 (1957) 11

Mahler v. *Eby*,
264 U.S. 32 (1924) 16

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 20

Cases—continued

Minnesota ex rel. Pearson v. *Probate Court*,
309 U.S. 270 (1940) 9, 18

Ng Fung Ho v. *White*,
259 U.S. 276 (1922) 15, 19

Norwood v. *Horney*,
853 N.E.2d 1115 (Ohio 2006) 10

One 1958 Plymouth Sedan v. *Pennsylvania*,
380 U.S. 693 (1965) 8, 11

Padilla v. *Kentucky*,
559 U.S. 356 (2010) ..... *passim*

Shuti v. *Lynch*,
828 F.3d 440 (6th Cir. 2016) 6

Trop v. *Dulles*,
356 U.S. 86 (1958) 11

United States ex rel. Klonis v. *Davis*,
13 F.2d 630 (2d Cir. 1926) 10

United States v. *Williams*,
553 U.S. 285 (2008) 18

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*,
455 U.S. 489 (1982) ..... *passim*

Winters v. *New York*,
333 U.S. 507 (1948) 16

Wong Yang Sung v. *McGrath*,
339 U.S. 33 (1950) 14

Woodby v. *INS*,
385 U.S. 276 (1966) 15

Yamataya v. *Fisher*,
189 U.S. 86 (1903) 19

Statutes, Rules and Regulations

18 U.S.C. § 16 1

18 U.S.C. § 16(b) 6

Amy Wolper, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of "Crimes Involving Moral Turpitude" in the Immigration and Nationality Act*, 31 Cardozo L. Rev. 1907 (2010) 15

Other Authorities

Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1889 (2000) 12

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Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289 (2008) 10

Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 Admin. L. Rev. 305 (2000) 16

INTEREST OF THE *AMICUS CURIAE*

The National Immigration Law Center ("NILC") is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity, and justice. NILC frequently files *amicus curiae* briefs in this Court and the lower courts addressing legal issues relevant to immigrants and their families.[1]

SUMMARY OF ARGUMENT

The question here is whether the term "crime of violence" in a criminal statute, 18 U.S.C. § 16, is unconstitutionally vague under the analysis applied by this Court in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015).

The government argues that the vagueness inquiry here should be less stringent than in the criminal context. The Court should reject that contention for four reasons.

First, the Court's precedents establish that deportation statutes violate due process if they fail the vagueness standard applicable to criminal laws. In

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Jordan v. *De George*, 341 U.S. 223 (1951), the Court stated that even though the deportation law at issue was "not a criminal statute," it would "we examine the application of the vagueness doctrine to this case." *Id.* at 231. Every court of appeals to address the question has concluded that Jordan requires application of the criminal-law vagueness standard to deportation statutes.

Second, deportation has the severe consequences that trigger strict vagueness review. It is retributive and in addition subjects the individual to the disapproval of the community—he or she is someone whose conduct is so improper as to warrant expulsion from the community. And its consequences are severe: "The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever." *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring). Moreover, deportation deprives the individual of the liberty guaranteed by the Constitution.

Third, adopting the government's argument would render this Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), a dead letter. The Court there emphasized the importance of informing a noncitizen of the deportation consequences of a criminal conviction. It is therefore critical that deportation statutes pass muster under the void-for-vagueness standard, so that defense counsel can properly counsel the noncitizen.

Fourth, the government's claim that vagueness analysis turns entirely on whether a proceeding is labeled "civil" or "criminal" was squarely rejected by this Court in *Village of Hoffman Estates* v. *Flipside*

Hoffman Estates, Inc., 455 U.S. 489 (1982), which recognized that, although the ordinance "nominally impose[d] only civil penalties," it was "quasi-criminal" because of its "prohibitory and stigmatizing effect"—and therefore necessitated "relatively strict" vagueness analysis. 455 U.S. at 499.

The Court therefore should hold that the statute here is subject to the same vagueness scrutiny applicable to a criminal law.

ARGUMENT

THE VOID-FOR-VAGUENESS DOCTRINE APPLIES TO THE DEPORTATION LAW AT ISSUE HERE.

A. This Court has held the vagueness doctrine applicable to deportation statutes.

The Court has twice recognized that the vagueness doctrine applies to statutes setting standards for deportation. As the lower courts have concluded, those rulings establish that deportation statutes violate due process if they fail the vagueness standard applicable to criminal laws.

The question in *Jordan* v. *De George*, 341 U.S. 223 (1951), was "whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude' within the meaning of" the applicable deportation statute. *Id.* at 224-225. This Court *sua sponte* raised and addressed the question whether the term "crime involving moral turpitude" was unconstitutionally vague. *Id.* at 224; see *id.* at 229.

"Despite the fact that this is not a criminal statute," the Court stated, "we shall nevertheless examine the application of the vagueness doctrine to this case." *Id.* at 231. The Court explained:

> We do this in view of the grave nature of deportation. The Court has stated that "deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."

Ibid. (alteration omitted) (quoting *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)).

The Court went on to "test this statute under the established criteria of the 'void for vagueness' doctrine." *Ibid.* That required the Court to assess whether the statute's language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-232.

The *Jordan* majority concluded that "Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the [government] is deportation." *Id.* at 232. Justice Jackson dissented, because in his view the phrase "ha[d] no sufficiently definite meaning to be a constitutional standard for deportation." *Ibid.* (Jackson, J., dissenting). No Member of the Court disputed that the penalty of deportation is sufficiently severe to trigger the due process vagueness standard applicable to criminal statutes.

Sixteen years later, in *Boutilier* v. *INS*, 387 U.S. 118, 118 (1967), the Court again applied the vagueness standard in assessing whether Boutilier's deportation on grounds of homosexuality was permissible under a statue excluding aliens "afflicted with psychopathic personality." It expressly reaffirmed that "the 'void for vagueness' doctrine" was applicable notwithstanding the civil nature of deportation proceedings. *Id.* at 123.

The Court went on to reject the vagueness challenge because Boutilier was being deported for "characteristics he possessed at the time of his entry" into the United States: "when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. The pattern was cut, and under it he was not admissible." *Ibid.* The vagueness doctrine did not apply to pre-entry conduct, the Court concluded, because—among other reasons—there was no basis for concluding that Boutilier would have looked to U.S. law to obtain "fair notice" regarding the consequences of his extraterritorial conduct.

The Court's analysis makes clear that the vagueness doctrine would have applied if the petitioner's deportation was based on his post-entry conduct. Indeed, it expressly distinguished the two situations: "The petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed at the time of his entry." *Id.* at 123. And the Court assessed, and rejected, the petitioner's claim that he was in fact being deported for post-entry conduct, concluding "[w]e do not believe that petitioner's post-entry conduct is the basis for his deportation order." *Id.* at 124. That analysis was necessary because the Court recognized that the vagueness doctrine would apply if the deportation were based on post-entry conduct.

The three courts of appeals to address the issue have concluded that *Jordan* and *Boutilier* require that deportation statutes be assessed under the void-for-vagueness standard applicable to criminal laws when, as here, deportation is based on post-entry conduct. *Shuti* v. *Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding 18 U.S.C. § 16(b)'s "crime of violence" language was unconstitutionally vague and concluding

that *Jordan* establishes that strict vagueness analysis applies to deportation laws); *Alphonsus* v. *Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) ("entertain[ing]" a vagueness challenge "because of the harsh consequences attached to" the law, relying on *Jordan*); *Beslic* v. *INS*, 265 F.3d 568, 571 (7th Cir. 2001) (citing *Jordan*) (recognizing that "the Supreme Court has made it clear that an alien may bring a vagueness challenge to a deportation statute"); see also *Baptiste* v. *Attorney General*, 841 F.3d 601, 615 n.7 (3d Cir. 2016) (stating that "the Attorney General wisely does not contest [the noncitizen's] assertion that he has a right under the Fifth Amendment's Due Process Clause to bring a void for vagueness challenge" and citing *Jordan*).[2]

Applying the criminal-law vagueness doctrine in this case is therefore consistent with—and required by—this Court's precedents.

B. Deportation based on a criminal law violation is subject to the vagueness standard applicable to criminal laws, because it has the characteristics that trigger that strict vagueness review.

In *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982), this Court explained that "[t]he degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment." It went on to observe

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[2] The Second Circuit held that a vagueness inquiry is required, but reserved the question of the level of scrutiny applicable in such a vagueness challenge. See *Arriaga* v. *Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) ("We need not decide whether the INA stalking provision should be assessed as a civil or criminal statute because even under the close scrutiny accorded criminal laws, Arriaga's vagueness challenge fails.").

that the Court has generally "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-499.

The government—ignoring the Court's explanation that "the consequences of imprecision are qualitatively less severe"—argues that the "civil" or "criminal" label dictates the proper standard of vagueness review. Pet. Br. 16. But this Court has made clear that the inquiry turns not on labels but on the particular characteristics of the sanction involved. Deportation based on a violation of a criminal statute plainly warrants the same vagueness review as a criminal statute.

1. Strict vagueness analysis applies to civil laws that serve the purposes of criminal punishment or that implicate an individual's right to liberty.

The Court has identified two characteristics of civil laws that trigger strict vagueness analysis: whether the law serves purposes akin to criminal sanctions and whether the law's application infringes on a constitutional right.

In *Hoffman*, for example, the Court observed that although the ordinance "nominally impose[d] only civil penalties," it was "quasi-criminal" because of its "prohibitory and stigmatizing effect." 455 U.S. at 499. For that reason, it "warrant[ed] a relatively strict" vagueness test. *Ibid.*; see also *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 241 (1932) (finding a civil statute unconstitutionally vague where the civil penalty was "not consistent with any purpose other than to inflict punishment").

Retribution and publicly branding conduct as harmful to society are characteristics of criminal sanctions. *Kansas* v. *Hendricks*, 521 U.S. 346, 373 (1997); see also *Ewing* v. *California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (identifying "the penological goal of retribution"). Therefore, strict vagueness review applies to civil statutes whose penalties serve those purposes.

The conclusion that protections typically reserved for the criminal context apply to civil proceedings when the penalty is retributive, and therefore quasi-criminal, is not limited to the vagueness doctrine. In *One 1958 Plymouth Sedan* v. *Pennsylvania*, this Court applied the exclusionary rule, another protection typically confined to criminal proceedings, in a civil forfeiture proceeding because "a forfeiture proceeding is quasi-criminal in character"—"[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 U.S. 693, 700 (1965).

The Court also applies a strict vagueness standard to civil statutes that involve deprivation of fundamental rights. The *Hoffman* Court explained that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." 455 U.S. at 499. See also *Gen. Media Commc'ns, Inc.* v. *Cohen*, 131 F.3d 273, 286 (2d Cir. 1997) ("[S]tatutes that implicate constitutionally protected rights * * * are subject to 'more stringent' vagueness analysis." (quoting *Hoffman*, 455 U.S. at 499)).

In *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 274 (1940), for example, this Court held a civil commitment statute up to the same

vagueness standard applicable to criminal laws. And in *Aptheker* v. *Sec'y of State*, the Court determined that facial vagueness review was warranted because the statute at issue "severely curtail[ed] personal liberty" by restricting the "freedom of travel." 378 U.S. 500, 516-517 (1964). See also *City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (considering but not deciding "whether the impact of the * * * ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine").[3]

In sum, courts apply strict vagueness review to civil statutes for at least two reasons: because their penalties serve the purposes of criminal punishment; and because their penalties put liberty, or other fundamental rights, at stake. Both reasons apply in the context of deportation for engaging in criminal conduct.

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[3] This Court has most often applied strict vagueness review under this interference-with-fundamental-rights rationale when First Amendment rights are implicated, see *Hoffman*, 455 U.S. at 499 ("If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); see also *Aptheker*, 378 U.S. at 517 (noting that "freedom of travel is a constitutional liberty closely related to rights of free speech and association"), but there is no basis for excluding interference with other fundamental rights. In fact, the Supreme Court of Ohio has explicitly endorsed the notion that vagueness doctrine should apply to civil statutes whenever they substantially affect any of a range of fundamental rights. In finding a takings ordinance void for vagueness, that court observed: "The vagueness doctrine is usually applied in criminal law and First Amendment claims, but neither the rationale underlying the doctrine nor the case law interpreting it suggests that it should not be applied in any case in which the statute challenged substantially affects other fundamental constitutional rights." *Norwood* v. *Horney*, 853 N.E.2d 1115, 1143 (Ohio 2006).

2. *Crime-based deportation is a uniquely severe penalty that serves the purposes of criminal punishment and threatens the individual's liberty.*

a. *Crime-based deportation is punitive.* This Court and the lower courts have long recognized the punitive nature of crime-based deportation, and this Court's analysis in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), makes clear that crime-based deportation constitutes punishment for the commission of an offense.

"The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever." *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring). Judge Hand called deportation "a dreadful punishment." *United States ex rel. Klonis* v. *Davis*, 13 F.2d 630, 630 (2d Cir. 1926). See generally Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289 (2008).

For that reason, this Court has recognized that viewing crime-based deportation "not as designed to punish [the individual] for the crime" is "highly fictional." *Trop* v. *Dulles*, 356 U.S. 86, 98 (1958). Deportation "may visit great hardship on the alien," resulting in "the loss of all that makes life worth living." *Fiswick* v. *United States*, 329 U.S. 211, 222 n.8 (1946) (quotation marks omitted); accord *Lehmann* v. *Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) (describing deportation as "punishment of the most drastic kind whether done at the time when they were convicted or later"); *Fong Yue Ting* v.

United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."); *id.* at 748 (Field, J., dissenting) (stating it should "never be admitted that the removal of aliens" is "not * * * punishment for an offense").

Indeed, it is particularly obvious that a civil penalty is sufficiently punitive to be labeled "quasi-criminal" when the civil penalty follows conviction for a criminal offense and is itself more severe than the punishment resulting directly from the criminal prosecution. See *One 1958 Plymouth Sedan*, 380 U.S. at 700-701 (finding a civil forfeiture statute "quasi-criminal" because "the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution").

This Court in *Padilla* expressly recognized that "'[p]reserving [an individual's] right to remain in the United States may be more important to the [individual] than any potential jail sentence.'" 559 U.S. at 368 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 322 (2001)). And it recognized the punitive, "particularly severe" nature of crime-based deportation. 559 U.S. at 365.

The Court explained in detail the extent to which crime-based deportation is uniquely bound up with, and even indistinguishable from, criminal punishment

> Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in

> our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it most difficult to divorce the penalty from the conviction in the deportation context.

Id. at 365-366 (internal quotation marks and citation omitted).

Thus, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most importance part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 364. See also Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1889, 1894 (2000) ("each of these justifications—incapacitation, deterrence, and retribution—is traditionally accepted as part of our criminal law").

Failing to apply the criminal law vagueness standard here would be wholly inconsistent with the Court's decision in *Padilla*.

The *Padilla* Court explained that "a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction." 559 U.S. at 373. It recognized that prosecutors retain tremendous flexibility in deciding which of these charges to offer or threaten in negotiations, and can thereby use "the threat of deportation [to] provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does." *Ibid.* And a noncitizen's defense counsel can "bargain creatively with the prosecutor

in order to craft a conviction and sentence that reduce the likelihood of deportation." *Ibid.*[4]

Padilla held that, under the Sixth Amendment, noncitizens in the position of navigating these difficult strategic choices have the right to be adequately informed of the deportation risks that could result from particular pleas. But if noncitizens had no protection against unconstitutionally vague deportation statutes, the right to effective counsel this Court affirmed in *Padilla* would be a dead letter.

Noncitizens' counsel must be able to assess the legal sufficiency of prosecutorial threats and the viability of potential strategies to avoid deportation. But by their very nature, unconstitutionally vague statutes do not provide the degree of predictability necessary for such reasoned legal analysis. A defense attorney cannot provide his or her client with advice if the attorney is unable to determine the deportation consequences of a particular plea. For that reason, application of the criminal-law vagueness test is particularly necessary, and particularly appropriate, in this context.

It is true, as the *Padilla* Court observed, that "immigration law can be complex," and that there are "situations in which the deportation consequences of a particular plea are unclear or uncertain." 559 U.S. at 369. This complexity is not a blank check that excuses Congress from the need to set meaningful legal standards, despite the government's suggestion to the contrary. Pet. Br. 22-23. If anything, the

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[4] As the *Padilla* court noted (559 U.S. at 372), 95% of all convictions result from pleas; these negotiations thus determine the particular conviction that ends up on a noncitizen's record the overwhelming majority of the time.

complexity of immigration law—combined with the "harsh consequences" that can follow if a noncitizen's counsel misunderstands it, *Padilla*, 559 U.S. at 360—*compounds* the importance of applying the vagueness standard in this context.

b. ***Interference with constitutional rights.*** The second feature that merits strict vagueness review of civil laws—interference with a fundamental constitutional right—also applies to deportation.

This Court has recognized that "[a] deportation hearing involves issues basic to human liberty and happiness." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950). Indeed, "the liberty of an individual is at stake" because "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).

That conclusion rests on "the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." *Woodby* v. *INS*, 385 U.S. 276, 285 (1966). See also *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) ("[Deportation] may result * * * in loss of both property and life, or of all that makes life worth living."); *Fong Yue Ting*, 149 U.S. at 740 (1893) (Brewer, J., dissenting) (deportation involves "a deprival of liberty").

Crime-based deportation, then, warrants strict vagueness review both because it is punitive and quasi-criminal, and because it implicates the right to liberty.

3. The Court should reject the government's label-based approach to vagueness analysis.

The government argues that the particular characteristics of the sanction are irrelevant to vagueness analysis. What counts is whether the proceeding is labeled "civil" or "criminal." Pet. Br. 16. But, as we have discussed, this Court has rejected that approach—including in the *Hoffman* decision on which the government relies. The critical question is the relative severity of the "consequences of imprecision" (*Hoffman*, 455 U.S. at 499)—what is at stake for the potential target of the sanction.[5]

The decisions on which the government relies provide no support for its position.

In *Winters* v. *New York*, 333 U.S. 507, 515 (1948), for example, this Court stated that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." Significantly, the Court did not refer to "criminal laws" but rather to "statutes punishing for offenses." In other words, if the

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[5] "Where the penalty imposed by a statute is severe, costs of vagueness are high and vagueness is less tolerable. Removal proceedings exemplify civil proceedings with severe quasi-criminal penalties. Therefore, the severity of deportation demands less tolerance of vagueness." Amy Wolper, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of "Crimes Involving Moral Turpitude" in the Immigration and Nationality Act*, 31 Cardozo L. Rev. 1907, 1934 (2010). See generally Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 Geo. Immigr. L.J. 115 (1999); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 Admin. L. Rev. 305, 313 (2000).

purpose and effect of the statute is punitive, strict vagueness analysis applies. If, on the other hand, the statute employs a penalty merely to enforce compliance, it is subject to a lower standard of certainty.[6]

The lower courts follow this approach, applying strict vagueness review when the penalty imposed for the law's violation carries the attributes of a criminal sanction or infringes constitutional rights—labels alone are not determinative. See, *e.g.*, *Advance Pharm., Inc.* v. *United States*, 391 F.3d 377, 396 (2d Cir. 2004) ("When a civil statute imposes penalties that, although civil in description, are penal in character, the statute is sometimes deemed 'quasi-criminal' and subjected to stricter vagueness review." (internal quotation marks and citation omitted)); *Clinical Leasing Serv.*, 925 F.2d 120, 122 & n.2 (5th Cir. 1991) (applying a "relatively strict test" for vagueness to a civil penalty provision of the Con-

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[6] Another case relied upon by the government, *Mahler* v. *Eby*, 264 U.S. 32 (1924), is inapposite for two reasons. First, the Court rested its decision in large part on the fact that the statute at issue delegated power to an executive agency—" [t]he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers." *Id.* at 41. Second, the Court determined that the standard was not vague:

> As far back as 1802 the naturalization statute of that year prescribed that no alien should be naturalized who did not appear to the court to have behaved during his residence in this country "as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard.

Id. at 40 (citation omitted).

trolled Substances Act because it "authorizes fines which, although civil in description, are penal in character," making the statute "quasi-criminal").

The government cites *A.B. Small Co.* v. *American Sugar Refining Co.*, in which this Court invalidated a civil statute that was "so indefinite as to be unintelligible," 267 U.S. 233, 240 (1925), and *Giaccio* v. *Pennsylvania*, in which this Court invalidated a law, without labeling it civil or criminal, because it "contain[ed] no standards at all." 382 U.S. 399, 403 (1966). But in *A.B. Small*, the Court applied in the civil context its prior holding that the same statute was unconstitutionally vague and therefore could not support the imposition of criminal liability—which argues for the same, rather than different, standards. 267 U.S. at 238. More fundamentally, these cases do not demonstrate that a lesser standard applies to civil laws; they merely describe a sufficient, but not necessary, condition for invalidation on vagueness grounds.[7]

Indeed, it is far from clear what a "less stringent" vagueness standard would require. As the government acknowledges (Pet. Br. 25), this Court has not addressed that question.

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[7] To the extent the government's cases do suggest that the civil laws they reviewed were held to a less strict standard, *Minnesota ex rel. Pearson* v. *Prob. Court* would equally suggest that the civil statute *it* concerned was held to the standard applied to criminal laws. This Court in *Pearson* made no mention of a lower standard, though the statute at issue was nominally civil; it said only that the statute passed vagueness scrutiny because it set a standard "as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." 309 U.S. 270, 274 (1940).

The government's preferred standard—"a test of unintelligibility" (Pet. Br. 26)—is so undemanding as to be meaningless. *Any* law that is unintelligible should be unenforceable. Whatever its possible merits in other contexts, that low bar should not apply here. Put simply, deportation is no ordinary civil penalty; a less strict standard that applies to ordinary civil statutes should not apply to crime-based deportation statutes.

C. Vagueness review vindicates the due process protections of fair notice and non-arbitrary enforcement, which are critically important for noncitizens facing deportation.

"Vagueness doctrine is an outgrowth * * * of the Due Process Clause." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). Vague statutes violate Due Process because, as this Court explained recently in *Johnson* v. *United States*, 135 S. Ct. 2551, 2557, they "den[y] fair notice to defendants and invit[e] arbitrary enforcement."

There is no doubt that due process applies to deportation proceedings. The Court has explained that "[deportation] may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285 (1922); see also *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903) (stating that immigration officials could not "disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution").

The government asserts that noncitizens have "no constitutionally grounded expectation of fair notice" because the Ex Post Facto Clause does not apply to deportation statutes. Pet. Br. 10. But the protection from overly vague statutes—which exists precisely to ensure fair notice—is grounded in the Due Process clause, not the Ex Post Facto Clause.

And due process protections, including vagueness review, *have* applied in a wide variety of civil contexts, depending on the nature of the punishment or deprivation. Indeed, it is precisely because the Ex Post Facto Clause does not apply, that makes vagueness review more, not less, essential to protect the due process rights of noncitizens.

In *Galvan* v. *Press*, 347 U.S. 522, 531 (1954), the Court recognized that "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation." It declined to take that step because the "view that the ex post facto Clause applies only to prosecutions for crime" had been "undeviatingly enforced" by the Court in a line of cases stretching back to *Calder* v. *Bull*, 3 U.S. 386 (1798). *Galvan*, 347 U.S. at 531 n.4.

But the *Galvan* Court recognized the applicability of due process: "considering what it means to deport an alien who legally became part of the American community * * * an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen." *Id.* at 530.

For those reasons, the due process-based protections requiring fair notice and prohibiting arbitrary deportation apply with full force in this context—and

mandate that the same vagueness standard apply here that applies in assessing criminal statutes.[8]

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[8] The same result would obtain under the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The private interests at stake are extraordinarily weighty. See pages 10-14, *supra*. And the risk of erroneous deprivation of those extremely important interests is quite serious in the case of an overly vague deportation statute, as a noncitizen might bargain away their entire lives in the United States by "plead[ing] guilty under a mistaken premise." *Padilla*, 559 U.S. at 387 (Alito, J., concurring). The government's countervailing interests do not outweigh the private interests of those facing deportation. The government does have a strong interest in the deportation of criminal aliens. But the application of vagueness review to its deportation statutes would not be likely to result in any particular "fiscal and administrative burdens" beyond, perhaps, the potential for some litigation. *Mathews*, 424 U.S. at 335. If anything, clearer legal standards may make the government's immigration enforcement and adjudication *more* efficient and *less* labor intensive.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

v.

JAMES GARCIA DIMAYA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY	3
ARGUMENT	5
I. INVALIDATING THE § 16 RESIDUAL CLAUSE WOULD RESTORE DUE PROCESS AND REDUCE ARBITRARINESS IN REMOVAL PROCEEDINGS	5
A. Residential Trespass	7
B. Unauthorized Use Of A Vehicle	7
C. Fleeing From An Officer	10
D. Unlawful Imprisonment	12
E. Stalking	14
F. Reckless Offenses	14
G. Firearms Possession	16
II. THE REMOVAL SYSTEM'S STRUCTURAL DIFFICULTIES EXACERBATE THE NOTICE PROBLEMS AND ARBITRARINESS BUILT-INTO THE § 16 RESIDUAL CLAUSE	18
III. INVALIDATING THE § 16 RESIDUAL CLAUSE WOULD NOT FORECLOSE REMOVAL IN MANY INSTANCES GIVEN THE MANY ALTERNATE REMOVAL GROUNDS	24
A. The Existence Of Other Aggravated Felony Grounds Subject To Mandatory Removal Would Mitigate The Impacts	

TABLE OF CONTENTS—continued

Page

About Which The Government Complains 25

B. Non-Aggravated Felony Removal Grounds Also Remain Readily Available To The Government 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Arellano Hernandez v. *Lynch*, 831 F.3d 1127 (9th Cir. 2016) 26
Ballesteros v. *Ashcroft*, 452 F.3d 1153 (10th Cir. 2006) 18
Baptiste v. *Att'y Gen.*, 841 F.3d 601 (3d Cir. 2016) 6, 16, 27
Camacho-Cruz v. *Holder*, 621 F.3d 941 (9th Cir. 2010) 26
Chambers v. *United States*, 555 U.S. 122 (2009) 10
Coleman v. *Texas*, No. 11-06-00155-CR, 2008 WL 97051 (Tex. Ct. App. Jan. 10, 2008) 8
In re C-V-T-, 22 I. & N. Dec. 3342 (B.I.A. 1998) 28
Damaso-Mendoza v. *Holder*, 653 F.3d 1245 (10th Cir. 2011) 26
De Leon Castellanos v. *Holder*, 652 F.3d 762 (7th Cir. 2011) 26
Delgado-Hernandez v. *Holder*, 697 F.3d 1125 (9th Cir. 2012) 13, 14
Dickson v. *Ashcroft*, 346 F.3d 44 (2d Cir. 2003) 13
In re Golicov, No. A047-547-785 (B.I.A. July 27, 2015) 11
Golicov v. *Lynch*, 837 F.3d 1065 (10th Cir. 2016), *rehearing denied*, No. 16-8530, slip op. (10th Cir. Nov. 4, 2016) 11
Gonzalez v. *Mukasey*, 548 F.3d 557 (7th Cir. 2008) 27
Houston v. *Lack*, 487 U.S. 266 (1988) 23
Idowu v. *Att'y Gen. of U.S.*, 512 F. App'x 222 (3d Cir. 2013) 27

TABLE OF AUTHORITIES—continued

Page

In re J-J-, 21 I. & N. Dec. 976 (B.I.A. 1997) 23
Johnson v. *United States*, 135 S. Ct. 2551 (2015) ..... *passim*
Kerr v. *Holder*, 352 F. App'x 958 (5th Cir. 2009) (per curiam) 13
Malta-Espinoza v. *Gonzales*, 478 F.3d 1080 (9th Cir. 2007) 14
Martinez v. *United States*, 135 S. Ct. 2939 (2015) 12
Mbea v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007) 26
Mellouli v. *Lynch*, 135 S. Ct. 1980 (2015) 19
Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 19, 21, 27, 28
Nieves-Medrano v. *Holder*, 590 F.3d 1057 (9th Cir. 2010) 26
Penuliar v. *Mukasey*, 528 F.3d 603 (9th Cir. 2008) 12
Quezada-Luna v. *Gonzales*, 439 F.3d 403 (7th Cir. 2006) 26, 27
Matter of Ramon Martinez, 25 I. & N. Dec. 571 (B.I.A. 2011) 26
Reyes-Soto v. *Lynch*, 808 F.3d 369 (8th Cir. 2015) 27
Roberts v. *Holder*, 745 F.3d 928 (8th Cir. 2014) 26
In re Salazar-Moreno, 2013 WL 6529317 (B.I.A. Dec. 3, 2013) (unpublished) 15, 16
Serna-Guerra v. *Holder*, 354 F. App'x 292 (5th Cir. 2009) (unpublished) (per curiam) 10

TABLE OF AUTHORITIES—continued

Page

Serna-Guerra v. *Holder*, 556 U.S. 1279 (2009) 10
Serna-Guerra v. *Mukasey*, 285 F. App'x 110 (5th Cir. 2008) (unpublished) (per curiam), *vacated*, 556 U.S. 1279 (2009) 8, 9
Matter of Singh, 25 I. & N. Dec. 670 (B.I.A. 2012) 14, 16
Singh v. *Holder*, 568 F.3d 525 (5th Cir. 2009) 26
Sykes v. *United States*, 564 U.S. 1 (2011) 11
United States v. *Coronado-Cura*, 713 F.3d 597 (11th Cir. 2013) 12
United States v. *Diaz-Diaz*, 327 F.3d 410 (5th Cir. 2003) 17
United States v. *Dunn*, 946 F.2d 615 (9th Cir. 1991) 17
United States v. *Franco-Fernandez*, 511 F.3d 768 (7th Cir. 2008) 12, 13
United States v. *Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999) 9
United States v. *Heron-Salinas*, 566 F.3d 898 (9th Cir. 2009) 26
United States v. *Martinez*, 771 F.3d 672 (9th Cir. 2014) (per curiam), *vacated*, 135 S. Ct. 2939 (2015) 12
United States v. *Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007) 9, 10
United States v. *Serafin*, 562 F.3d 1105 (10th Cir. 2009) 17
United States v. *Venegas-Ornelas*, 348 F.3d 1273 (10th Cir. 2003) 7

TABLE OF AUTHORITIES—continued

Page

United States v. *Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008) 15
Valdiviez-Hernandez v. *Holder*, 739 F.3d 184 (5th Cir. 2013) 23
Wilborn v. *Texas*, No. 12-06-00258-CR, 2007 WL 2381376 (Tex. Ct. App. Aug. 22, 2007) 9
Zivkovic v. *Holder*, 724 F.3d 894 (7th Cir. 2013) 7

COURT DOCUMENTS

Answering Brief, *Patel* v. *Lynch*, (No. 13-70289) (9th Cir. Apr. 14, 2014), ECF No. 29 17
Appellant's Brief in Support of Appeal of Pretermission of Application for Relief, *Matter of Salazar-Moreno*, No. A 035-305-657 (B.I.A. Oct. 23, 2013)..... 14, 15
Brief for Petitioner, *Serna Guerra* v. *Mukasey*, 2008 WL 5649865 (5th Cir. Feb. 25, 2008) 8

STATUTES AND REGULATIONS

8 C.F.R. § 238.1 22
§ 1003.1(b)..... 22
8 U.S.C. § 1101(f)(8) 25
§ 1158..... 25
§ 1226(c)..... 20, 25
§ 1227..... 25, 27
§ 1228..... 22, 25
§ 1229a..... 19
§ 1229b..... 25, 28
§ 1229c..... 25
§ 1362..... 19

TABLE OF AUTHORITIES—continued

Page

§ 1427(a) 25
18 U.S.C. § 16 ..... 5, 25

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Page

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TABLE OF AUTHORITIES—continued

Page

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INTEREST OF *AMICI CURIAE*[1]

Amici are immigrant rights organizations with substantial interest in the Court's resolution of this case.

National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct, litigated on behalf of noncitizens as *amici curiae* in the federal courts, and authored Immigration Law and Crimes and four other treatises published by Thompson-Reuters. NIPNLG has firsthand experience with the 18 U.S.C. § 16(b) issues presented here, having submitted a brief and participated in oral argument as *amicus* in the Court of Appeals in this case as well as other cases implicated in the circuit split that cert. was granted to resolve, *Golicov* v. *Lynch*, 837 F.3d 1065 (10th Cir. 2016); *Shuti* v. *Lynch*, 828 F.3d 440 (6th Cir. 2016).

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), respondent Dimaya and the United States received timely notice of, and consented to, *amici curiae*'s filing of this brief. Their consent letters have been filed with this brief.

between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes.

American Immigration Lawyers Association (AILA) is a national association with more than 14,000 members, including lawyers and law school professors who practice and teach immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in immigration and naturalization matters. AILA's members practice before the Department of Homeland Security and Executive Office for Immigration Review, as well as before the Federal Courts.

Amicus National Immigrant Justice Center (NIJC) is a non-profit organization that the Board of Immigration Appeals has accredited since 1980 to provide immigration assistance. NIJC provides free and low-cost legal services to approximately 8,000 noncitizens per year, and represents hundreds of noncitizens who are placed into removal proceedings as a result of guilty pleas in state criminal courts. NIJC also offers no-cost training and consultation to criminal defense attorneys representing noncitizens, to train and advise regarding the immigration consequences of particular convictions.

As organizations defending the rights of immigrants in the nation's removal system, *amici* share a significant interest in ensuring that the rules governing classification of criminal convictions for removal purposes give noncitizens fair notice and comport with due process. *Amici* and its members have participated in litigation around the country on the vague-

ness of 18 U.S.C. § 16(b), and as *amicus curiae* in significant cases at the intersection of criminal and immigration law before this Court. See, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). In their work, *amici* have observed the interpretative difficulties adjudicators and courts face in applying the wide-ranging and indeterminate inquiry required under § 16(b). Further, *amici* see the need for robust protections against vagueness in removal proceedings because of the serious practical difficulties they have observed in the system. The Court's decision in this case will directly affect the interests of the noncitizen clients of *amici* and *amici*'s members.

INTRODUCTION AND SUMMARY

Section 16(b) of title 18 of the United States Code, like the similarly-worded residual clause of the Armed Career Criminal Act (ACCA), is unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," which yields unpredictable and arbitrary results. *Johnson* v. *United States*, 135 S. Ct. 2551, 2557-58 (2015). The decision below therefore should be affirmed.

In this brief, *amici* focus on the negative effects that exist and will continue if the § 16 residual clause is upheld. First, *amici* show that widespread circuit and agency disagreement exist over the meaning of § 16(b) as applied in removal proceedings, and illustrate that questionable applications of § 16(b) inflict significant harm on noncitizens and unduly complicate the work of courts (*infra* § I). If § 16(b) survives,

divergent rulings will persist because it is impossible to apply this inherently vague law in a consistent manner. This is important because *Johnson* reaffirmed "that the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." 135 S. Ct. at 2558 (quoting *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

Second, *Amici* show how the § 16 residual clause's vagueness exacerbates practical difficulties of noncitizens attempting to defend themselves against removal (*infra* § II). Many of these litigants, fighting to stay in a country their family has made home, are unrepresented, detained, and of limited English proficiency. Their task is arduous even when the removal charge is not vague. But, defending against removal under § 16(b) becomes an insurmountable barrier, even if they would otherwise have valid defenses.

Lastly, relying on their experience in removal cases, *amici* show that finding the § 16 residual clause unconstitutional will not, as the government contends, interfere with its efforts to remove dangerous criminal noncitizens. Even without § 16(b), the government has at its disposal an arsenal of removal grounds and other tools to achieve law, order, and security without violating the Constitution (*infra* § III).

Affirming the vagueness of the § 16 residual clause appropriately will help ensure that noncitizens will not be banished for life and forcibly separated from their families in violation of the due process clause of the Fifth Amendment.

ARGUMENT

I. INVALIDATING THE § 16 RESIDUAL CLAUSE WOULD RESTORE DUE PROCESS AND REDUCE ARBITRARINESS IN REMOVAL PROCEEDINGS.

Respondent Dimaya properly details that the § 16 residual clause parallels in all material respects the ACCA residual clause held unconstitutionally vague in *Johnson*. See Br. for Resp't at 12-39. Like the text of the ACCA residual clause, the language of § 16(b) provides little guidance on how to determine whether the imagined "ordinary case" of a given offense "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C § 16(b). And with § 16(b) too, inherent vagueness is evidenced by the courts' and factfinders' repeated "failure . . . 'to establish a standard'" for applying the statute across offenses and jurisdictions. *Johnson*, 135 S. Ct. at 2558 (quoting *L. Cohen Grocery Co.*, 255 U.S. at 91). The decisions applying § 16(b) and interpreting what it means for a risk to be "substantial" as applied to the hypothetical "ordinary case" are anything but standard: they strike dissonant chords across the Nation.

That is not surprising given the "ordinary case" analysis is anchored in an individual judge's hypothetical estimation of what a standard case *should* entail, rather than in the offense's statutory elements or the defendant's actual conduct. Indeed, in *Johnson*, the Court was flummoxed by this search for the ordinary or usual instance of a particular offense: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Johnson*, 135 S. Ct.

at 2257-58 (quoting *United States* v. *Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)); see *Baptiste* v. *Att'y Gen.*, 841 F.3d 601, 611 (3d Cir. 2016) ("There is little guidance as to how we should go about identifying th[e] conduct ... associated with the *normal or usual* commission of the crime" in evaluating § 16(b) (emphasis added)).

Thus, what animated this Court to conclude that the ACCA residual clause was a "failed enterprise" applies equally here. *Johnson*, 135 S. Ct. at 2560. Just as the ACCA residual clause failed to guide courts in deciding what the "ordinary case" of a particular offense involves or how to measure the uncertain risk it poses, the § 16 residual clause has the same shortcomings and therefore also fails to satisfy the Constitution.

The examples outlined below, spanning a broad array of offense types, illustrate the profound confusion that courts experience when interpreting the § 16 residual clause. This confusion has led to unfair and arbitrary results in the courts, and a failure to provide fair notice or achieve predictable standards as required by the Constitution. Continuing the § 16(b) experiment will only create new conflicts given the indeterminacies built into the § 16 residual clause. As was the situation with the ACCA residual clause, there is "pervasive disagreement" among the courts and agency "as to the nature of the inquiry" and whether many particular offenses come within § 16(b). *Johnson*, 135 S. Ct. at 2560. Consistent with the conflicts identified in Respondent's brief 31-33, the disagreements highlighted below span a wide variety of criminal convictions, including residential trespass, unauthorized use of a vehicle, fleeing from an officer, unlawful imprisonment, stalking, reckless

offenses, and firearms possession. The only predictable outcomes are continued disagreements among the courts and continued harms to immigrants.

A. Residential Trespass.

In the Tenth Circuit, residential trespass is a crime of violence under the § 16 residual clause, because supposedly "[a] defendant will often encounter resistance either from occupants or structural barriers in 'entering or remaining' in someone's dwelling unlawfully, regardless of the defendant's intent in being there." *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1278 (10th Cir. 2003). Typical of the approach in such residual clause cases, the Tenth Circuit did not look to underlying prosecutions or any other external metric to determine the risk inherent in the ordinary case of residential trespass.

Demonstrating a contradictory interpretation under the § 16 residual clause, the Seventh Circuit found that felony residential trespass does not involve a substantial risk of violence. *Zivkovic* v. *Holder*, 724 F.3d 894, 906 (7th Cir. 2013). In doing so, the Seventh Circuit judged the "ordinary case" in completely different terms from the Tenth Circuit, hypothesizing that because there is no "breaking or any other force" required, "[a] person could commit residential trespass by walking through a neighbor's open door under the mistaken belief that she is hosting an open house, a party, or a garage sale." *Id.* These conflicting interpretations of the same offense show the difficulty of deciding which scenario within the range of criminalized conduct is properly considered the ordinary case.

B. Unauthorized Use Of A Vehicle.

Because of the indeterminacy of § 16(b), the Fifth and Tenth Circuits have long found themselves in

conflict over how to interpret whether the crime of violence provision includes unauthorized use of a vehicle (the offense's elements generally are intentional or knowing operation of a motor vehicle without the owner's effective consent). Jose Serna Guerra fell victim to that conflict, and ultimately required this Court's intervention to prevent his deportation.

Mr. Serna Guerra is a native of Mexico who moved to the United States with his family as a lawful permanent resident in 1983. See *Serna-Guerra* v. *Mukasey*, 285 F. App'x 110 (5th Cir. 2008) (unpublished) (per curiam), *vacated*, 556 U.S. 1279 (2009); Br. for Pet'r, *Serna Guerra* v. *Mukasey*, 2008 WL 5649865, Statement of Facts (unpaginated) (5th Cir. Feb. 25, 2008). His two children, parents, and most of his siblings are United States citizens. *Id.*

In 1986, when Mr. Serna Guerra was twenty years old, he pled guilty to unauthorized use of a vehicle under Tex. Penal Code § 31.07 and was sentenced to five years-probation on a suspended sentence. *Id.* After Mr. Serna Guerra completed one-third of his probation, the court set aside the conviction. *Id.* He had no convictions thereafter and became a bus driver for the Laredo Independent School District.

Nonetheless, 18 years after his plea to unauthorized use, the federal government began deportation proceedings. It did so based on the contention that the unauthorized use conviction was an aggravated felony under § 16(b). *Id.* Both the immigration judge and Board of Immigration Appeals agreed. *Id.*

On appeal to the Fifth Circuit, Serna Guerra argued that a substantial risk of force does not inhere in the offense because there is no requirement of breaking into or taking of property by force. See, *e.g.*, *Coleman* v. *Texas*, No. 11-06-00155-CR, 2008 WL

97051 (Tex. Ct. App. Jan. 10, 2008) (convicting defendant for operating a vehicle beyond the time allotted by the vehicle's owner); *Wilborn* v. *Texas*, No. 12-06-00258-CR, 2007 WL 2381376 (Tex. Ct. App. Aug. 22, 2007) (same).

The Fifth Circuit affirmed the Board, but only because it was bound by prior precedent holding that unauthorized use was a crime of violence under § 16(b). See *Serna-Guerra*, 285 F. App'x at 111 (citing *United States* v. *Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999)). The Fifth Circuit's rule was premised on speculation that:

> [T]here is a strong probability that the inexperienced or untrustworthy driver who has no pride of ownership in the vehicle will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a *strong probability* exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.

Galvan-Rodriguez, 169 F.3d at 219-20 (emphasis added).

Despite affirming, the panel in Serna Guerra's case overtly disagreed with this view of the ordinary case of unauthorized use and the risk it presented. See *Serna-Guerra*, 285 F. App'x at 113. Rather, it agreed with the Tenth Circuit that such offenses *do not* present a substantial risk of violence. See *United States* v. *Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007). The Tenth Circuit had conceptualized the "ordinary case" in completely different terms from the Fifth Circuit, reasoning that Arizona's unlawful use of

means of transportation presented a *low* probability of violence because it "encompasses a broad range of conduct that does not present any risk of such force being used" such as driving a rental vehicle past the expiration of the rental agreement, borrowing a car that he or she knows is stolen, or taking another's keys and going joyriding. 501 F.3d at 1213 (emphasis in original).

This Court vacated the judgment and remanded the case in light of *Chambers* v. *United States*, 555 U.S. 122 (2009), an ACCA case. *Serna-Guerra* v. *Holder*, 556 U.S. 1279 (2009). Upon remand, the Fifth Circuit reversed and found that the offense contained "no essential elements of violent and aggressive conduct" under *Chambers* or *Begay*, and therefore did not fall under § 16(b). *Serna-Guerra* v. *Holder*, 354 F. App'x 292 (5th Cir. 2009) (unpublished) (per curiam). Almost two years later, the immigration judge dismissed all immigration charges against Mr. Serna Guerra. He immediately filed for citizenship and naturalized one year later.

Mr. Serna-Guerra was able to defeat his deportation after seven years of litigation at his own expense and after a rare remand by this Court. But his case demonstrates the ambiguity inherent in § 16(b). It also confirms that the interpretive confusion surrounding § 16(b), like with the ACCA residual clause, has mirrored this Court's struggles to settle on a consistent standard.

C. Fleeing From An Officer.

The courts and the Board of Immigration Appeals also conflict over applying the § 16 residual clause to fleeing from an officer; that offense generally requires willfully eluding or failing to stop for a police officer, knowing that the officer has signaled the vehicle to

stop. The Board continues to apply the reasoning of this Court's now-overruled ACCA residual clause decision in *Sykes* v. *United States*, 564 U.S. 1 (2011), which relied on national statistics to "confirm the *commonsense* conclusion that . . . vehicular flight crime is a violent felony." *Id.* at 10 (emphasis added), *overruled by Johnson*, 135 S. Ct. 2551. For instance, Constantine Fedor Golicov was ordered deported by the BIA based on *Sykes*, and his fate likely rests on the outcome in the instant case.

Mr. Golicov is a thirty-year old Moldova national. See *Golicov* v. *Lynch*, 837 F.3d 1065, 1067 (10th Cir. 2016), *rehearing denied*, No. 16-8530, slip op. (10th Cir. Nov. 4, 2016). He has been a permanent resident for fifteen years. *Id.* In 2012, the government charged him as an aggravated felon under § 16(b) based on a conviction for failing to stop at an officer's command. *Id.* The Board reversed the immigration court's decision that the failure to stop offense did not fall within § 16(b). See *In re Golicov*, No. A047-547-785 (B.I.A. July 27, 2015). Despite this Court's decision in *Johnson*, relying on *Sykes* and other ACCA residual clause cases, the Board concluded that "the offense will, in the ordinary case, create a risk of direct confrontation with the police." *Id.* at 4. On appeal, the Tenth Circuit declared § 16(b) void for vagueness because it "substitutes guesswork and caprice for fair notice and predictability." *Golicov*, 837 F.3d at 1075 (citing *Shuti* v. *Lynch*, 828 F.3d 440, 450 (6th Cir. 2016)).

Should this Court reverse here and then vacate and remand the Tenth Circuit's decision, the court of appeals will be faced with the unanswerable question of whether the ordinary case of fleeing an officer presents a substantial risk of violence. The Tenth Circuit would have to choose between the two diverging circuit approaches discussed below. No matter which

approach it endorses, the Tenth Circuit's decision will create a 2-1 split ripe for this Court's review.

The Eleventh Circuit has reached the same result as the Board based on *Sykes*. See *United States* v. *Coronado-Cura*, 713 F.3d 597 (11th Cir. 2013). There, the court intuited that the ordinary case of fleeing creates high risks of "car crashes," even where the statute is silent as to a disregard for the safety of others. *Id.* at 600.

The Ninth Circuit has come to a contrary conclusion. In *Penuliar* v. *Mukasey*, it held that willfully fleeing an officer where the vehicle is driven in a willful or wanton disregard is not categorically a crime of violence under § 16(b). 528 F.3d 603, 610-11 (9th Cir. 2008). In so holding, the Ninth Circuit conceptualized the ordinary case based on the *minimum* required for conviction—willfully fleeing while disregarding the safety of others by negligently committing three traffic violations. *Id.* Thus, the Ninth Circuit reached the opposite conclusion by focusing solely on the risk of violence emanating from the manner in which the car was being driven, *without* assuming that the fleeing itself presents a substantial risk of violence.[2]

D. Unlawful Imprisonment.

The Second, Fifth, and Seventh Circuits have held that false imprisonment of a child without the consent of her legal guardian does not come within the § 16 residual clause. See *United States* v. *Franco-*

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[2] The Ninth Circuit in an ACCA case later held that *Penuliar* "is no longer good law in light of the Supreme Court's decision in *Sykes*." *United States* v. *Martinez*, 771 F.3d 672, 677 (9th Cir. 2014) (per curiam). This Court, however, vacated that decision in light of *Johnson*. *Martinez* v. *United States*, 135 S. Ct. 2939 (2015). Thus, *Penuliar* is once again the rule in the Ninth Circuit.

Fernandez, 511 F.3d 768, 772 (7th Cir. 2008) (holding that child abduction by a putative father does not fall under § 16(b) because "the offense specifically targets nonforcible conduct ... without regard to the victim's resistance, consent, or acquiescence."); *Dickson* v. *Ashcroft*, 346 F.3d 44, 52 (2d Cir. 2003) (holding that unlawful imprisonment offense is not categorically a crime of violence under § 16(b)" and thus modified approach applies); *Kerr* v. *Holder*, 352 F. App'x 958 (5th Cir. 2009) (per curiam) (applying same analysis).

Those circuits concluded that an offense which covers a child who acquiesces or consents in fact to the confinement does not present a *substantial* risk of force. As the Fifth Circuit has reasoned, while "[t]here is certainly a possibility that physical force *might* result from a parent whose child is confined without the parent's consent ... such force is not necessarily required to commit the offense." *Kerr*, 352 F. App'x at 964 (emphasis added). In other words, these courts have assessed the risk inherent in the most benign conduct that could be prosecuted in determining the ordinary case.

The Ninth Circuit has taken a different approach by hypothesizing what the typical kidnapping/unlawful imprisonment case looks like. See *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125 (9th Cir. 2012). Kidnapping under California law is "tak[ing] by force or fraud." But in 2003, the California legislature eliminated the requirement of "force" in a kidnapping that involves a small child. *Id.* at 1128-29. While acknowledging that "a non-custodial parent who refuses to return with her children from a vacation" does not entail a substantial risk of force, the court found that the change in the law does not represent the "ordinary case" of kidnapping, but merely sets a "lower *limit*." *Id.* at 1129 (emphasis in origi-

nal). The Court then concluded that the ordinary case of the offense met the requisite risk threshold after surveying how the generic crime of kidnapping is characterized in the majority of jurisdictions, divorced from the elements of the California offense. *Id.* at 1132-33.

E. Stalking.

The Board of Immigration Appeals and the Ninth Circuit have clashed as to whether stalking is a crime of violence. In *Malta-Espinoza* v. *Gonzales*, 478 F.3d 1080, 1083-84 (9th Cir. 2007), a split Ninth Circuit panel found that stalking does not present a substantial risk of violence against the victim because the offense can be committed long-distance through pictures and letters and because no proof is required that the defendant intended to carry out threats. But upon remand, the BIA disagreed with the Ninth Circuit and relied on *Sykes* to hold that stalking comes within § 16(b) because specific prosecutions and national stalking statistics indicate that the ordinary case does present a substantial risk of confrontation and violence). See *Matter of Singh*, 25 I. & N. Dec. 670, 677-79 (B.I.A. 2012).

E. Reckless Offenses.

As detailed in Respondent Dimaya's brief, the circuits also split on whether reckless offenses come within the § 16 residual clause. See Br. for Resp't at 25-27. Meanwhile, the BIA continues to deport people, such as Ms. Felipa Salazar-Moreno, for reckless offenses depending on the law of the circuit of appeal.

In 1976, Ms. Felipa Salazar-Moreno moved to the United States as a young girl. For 38 years, she lawfully resided here as a permanent resident until being deported in 2014. See Appellant's Brief in Support of Appeal of Pretermission of Application for Re-

lief at 2, *Matter of Salazar-Moreno*, No. A 035-305-657 (B.I.A. Oct. 23, 2013) (hereinafter "Appellant's Br.") Her entire family, including her two United States citizen children, all reside in the United States. She has spent much of her life working as a cafeteria worker in the public schools.[3]

In 2011, Ms. Salazar-Moreno was intoxicated at her home, when the police knocked on her door after receiving a noise complaint. In response, Ms. Salazar-Moreno swung open the storm door and in the process injured the arm of the officer. As a result, she pled guilty to Assault on a Public Servant in violation of Texas Penal Code § 22.01, which penalizes intentionally, knowingly, or recklessly causing injury to a police officer. Voluntary intoxication is not a defense. She received a suspended sentence of eight years to be served on probation.

In 2013, the federal government sought to deport Ms. Salazar-Moreno as an aggravated felon under § 16(b). She argued that her offense did not come within § 16(b) because she had been convicted of a reckless act, which does not qualify as a "use" of force. See Appellant's Br. at 6-7. As support, she pointed to *United States* v. *Zuniga-Soto*, in which the Tenth Circuit had found, in evaluating reckless assault under Texas law, that reckless offenses did not come within §16(a) or § 16(b). 527 F.3d 1110, 1124 (10th Cir. 2008).

Nonetheless, the Board of Immigration Appeals affirmed an immigration judge's decision finding her deportable. See *In re Salazar-Moreno*, 2013 WL 6529317, *2 (B.I.A. Dec. 3, 2013) (unpublished). In

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[3] The facts of Ms. Salazar-Moreno's case are detailed in a declaration by her attorney on file with counsel of record. Decl. of John Bray, Esq. of Oosterhof & Bray, PLLC (Dec. 17, 2016).

doing so, the Board relied on a sentencing guidelines case, in which the Fifth Circuit held that Texas reckless assault creates a "serious potential risk of physical *injury* to another." *Id.* at *1 (citing *United States* v. *Anderson*, 559 F.3d 348, 355 (5th Cir. 2009) (emphasis added)). Unlike the Tenth Circuit, the Board, in interpreting § 16(b), has found the touchstone is "not on the mens rea of the crime itself," but instead "whether there is a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime."[4] See *Matter of Singh*, 25 I. & N. Dec. at 677. Ms. Salazar-Moreno could not afford to appeal the decision and was deported.

G. Firearms Possession.

The courts also struggle to apply the § 16 residual clause to various firearm possession crimes. Again, this disagreement stems from the different approaches courts take to imagining how the hypothetical "ordinary case" of the offense plays out and the risk presented.

The Ninth Circuit has held that a federal conviction for possession of an unregistered firearm is a crime of violence under § 16(b) because it is "presumptive evi-

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[4] Applying § 16(b) in a manner that gives fair notice becomes even more difficult when evaluating an offense, such as Ms. Salazar-Moreno's, that proscribes both intentional and reckless conduct. Even if the noncitizen's conduct was reckless, and the circuit law holds that reckless conduct does not come within § 16(b), courts must assess the risk inherent in the "ordinary case" of the offense. A court could surmise, as the Third Circuit has, *see Baptiste*, 841 F.3d at 614, that for a statute that covers such a wide swath of conduct—both intentional and reckless—that the "ordinary case" "presumptively lies at or near the middle" of the spectrum of offenses and thus presents a risk of violence. *Id.*

dence of unlawful violent intentions and, therefore, involves the substantial risk of violence[.]" *United States* v. *Dunn*, 946 F.2d 615, 620–21 (9th Cir. 1991). Relying on gut instinct, the Court did not look to underlying prosecutions or any other external metric to determine the risk inherent in the ordinary case of the offense.

Accordingly, the Board continues to find and the Government continues to assert in cases arising in the Ninth Circuit that firearm possession offenses satisfy § 16(b). Notwithstanding the Government's contention here that there is agreement post-*Leocal* that such offenses *do not* present a substantial risk of violence in the course of committing the offense, see Br. for the United States at 33-34, it is *currently* arguing the opposite to the Ninth Circuit—that possession of a short-barreled shotgun satisfies § 16(b) because of "the criminal and violent nature of the weapon itself and the probability that someone who possesses such a weapon will, in the ordinary case, actually use it during the course of possession."[5]

Two other circuits, by contrast, have not hypothesized that the ordinary case of possession of a short-barreled gun involves a substantial risk of violence because "physical force against the person or property of another need not be used to complete [that] crime' ... [i]nstead, it is complete upon ... mere knowing possession of the weapon." *United States* v. *Diaz-Diaz*, 327 F.3d 410, 414 (5th Cir. 2003) (quoting *United States* v. *Hernandez-Neave*, 291 F.3d 296, 299 (5th Cir. 2001). See *United States* v. *Serafin*, 562 F.3d 1105, 1107 (10th Cir. 2009).

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[5] Answering Brief at 17, *Patel* v. *Lynch*, (No. 13-70289) (9th Cir. Apr. 14, 2014), ECF No. 29 (on appeal and awaiting the outcome in the instant case).

* * *

Taken together, these examples demonstrate how removability based on § 16(b) for a noncitizen convicted of any number offenses is neither consistent nor predictable. Whether the noncitizen is deported turns on the fortuity of where immigration removal proceedings happen to be initiated. And where the proceedings are initiated often turns on where the noncitizen is detained, which may not correspond with the state and circuit in which he or she resides or was convicted. See, *e.g.*, *Ballesteros* v. *Ashcroft*, 452 F.3d 1153, 1157 (10th Cir. 2006). In other words, a noncitizen could plead guilty to an offense, relying on the favorable interpretation under the law of the circuit in which she is convicted. But the government is free to initiate removal proceedings elsewhere—including a circuit that has reached the opposite conclusion due to the confusion generated by § 16(b).

Invalidating the § 16 residual clause would eliminate arbitrarily different results in materially indistinguishable cases and would more adequately put immigrants on notice as to offenses that trigger removal.

II. THE REMOVAL SYSTEM'S STRUCTURAL DIFFICULTIES EXACERBATE THE NOTICE PROBLEMS AND ARBITRARINESS BUILT-INTO THE § 16 RESIDUAL CLAUSE.

Section 16(b)'s notice and arbitrary enforcement problems, which parallel those addressed in *Johnson*, 135 S. Ct. at 2256, are exacerbated in the removal context. Unlike the ACCA setting, which offers significant procedural protections to criminal defendants, noncitizens in the removal system face numerous serious practical difficulties, including lack of counsel, detention, language barriers and summary proceed-

ings.[6] Given the conflicting guidance, speculation, and subjectivity built into the § 16(b) inquiry, attempting to litigate the question of what amount of risk a hypothetical, ordinary case of a given crime entails is necessarily an arduous task even for attorneys well-versed in immigration law. But for noncitizens in removal proceedings, defending such a charge becomes an insurmountable hurdle for several reasons.

First, noncitizens in removal proceedings have no statutory right to government-appointed counsel. 8 U.S.C. §§ 1229a(b)(4)(A), 1362. Forty-five percent of noncitizens in removal proceedings before an immigration judge are unrepresented.[7] Many cannot afford counsel on their own, and unrepresented immigrants often lack an adequate understanding of the legal standards at issue in their cases, let alone the complexities in the case law set forth above. This leads to significantly different outcomes; noncitizens with lawyers are far more likely to prevail in their cases than those without lawyers.[8]

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[6] In light of these concerns, this Court has repeatedly upheld a strong elements-based categorical approach. *See Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013). The categorical approach promotes many of the same concerns animating the vagueness doctrine here, "efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987. However, the unique iteration of the categorical approach baked into § 16(b)—the ordinary case approach—undermines these very objectives.

[7] U.S. Dep't of Justice, Exec. Office of Immigration Review, *FY 2014 Statistics Yearbook*, F1, fig. 10 (2015) ("EOIR" Yearbook), http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf (hereinafter "*FY 2014 Statistics Yearbook*").

[8] *See, e.g.*, Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev.

Second, noncitizens merely *charged* as removable under § 16(b) are subject to mandatory detention during the entire course of removal proceedings, § 1226(c), in facilities that are indistinguishable from jail or prison. Indeed in 2013, the Government detained over 440,000 noncitizens in removal proceedings.[9] Those in detention are even less likely to be assisted by counsel; from 2007 to 2012, only 14 percent of detained noncitizens had lawyers.[10] Thus, the vast majority are forced to proceed *pro se* and will fail to receive any legal assistance in defending against § 16(b). Without counsel, detainees are unable to research, gather, and present evidence that is critical to defending a charge of deportability under § 16(b).

Moreover, a detained noncitizen proceeding pro se will rarely (if ever) have the necessary resources to counter a charge that his or her conviction comes

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357, 363-64 (2011) (finding that amongst nondetained immigrants, 74 percent with counsel have successful outcomes versus 13 percent success rate without counsel; and that amongst detained immigrants, 18 percent with counsel have successful outcomes versus 3 percent success rate without counsel) (hereinafter "*Accessing Justice*").

[9] John F. Simanski, U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2013*, 5 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

[10] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015). Even those who do have counsel have difficulty communicating with their attorneys. For example, in 2010, 78 percent of detainees "were in facilities where lawyers were prohibited from scheduling private calls with clients." Nat'l Immigrant Justice Ctr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, 4 (2010), http://www.immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

within § 16(b). Detainees' access to legal materials is significantly restricted. For example, the government's detention standards do not provide for access to state-specific legal materials that would be needed to ascertain the "ordinary case."[11] Further, detainees typically have little to no access to email or the internet,[12] and only limited access to telephone or fax.[13] These access limitations thwart a noncitizen's ability to compile evidence and engage in the sophisticated multi-step legal analysis necessary to rebut such a charge. See *e.g.*, *Moncrieffe*, 133 S. Ct. at 1690 (recog-

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[11] *See* 2011 Operations Manual ICE Performance-Based National Detention Standards, Part 6, Appendix 6.3A (List of Legal Reference Materials for Detention Facilities), 410-13, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/law_libraries_and_legal_material.pdf (hereinafter "Operations Manual"). Moreover, a 2009 study reported that "29 [immigration] detention facilities lacked an actual law library" and "27 facilities inappropriately limited detainees' access to their law libraries." Nat'l Immigration Law Ctr. *et al.*, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* 33-34 (2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf (hereinafter "*A Broken System*").

[12] *See, e.g.*, Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two Year Review* 40 (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf; Northern California Collaborative for Immigrant Justice, *Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California*, 20 (2014), http://law.stanford.edu/wpcontent/uploads/sites/default/files/publication/773705/doc/slspublic/11-4-14-Access-to-Justice-Report-FINAL.pdf

[13] *See* Operations Manual at Part 5.6 (Telephone Access); *see* U.S. Gov't Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities*, at 5 (2007), http://www.gao.gov/assets/270/263327.pdf.

nizing that noncitizens in detention "have little ability to collect evidence").

Third, language barriers further exacerbate the difficulties noncitizens would face under the continued application of § 16(b). For the approximately 85 percent of noncitizens in removal proceedings not fluent in English,[14] it is demonstrably more difficult, particularly for those who are *pro se*, to understand the intricacies of assessing the risk inherent in the hypothetical, ordinary case of their offense of conviction.

Fourth, noncitizens without lawful permanent resident status[15] charged as aggravated felons are subject to summary removal procedures known as "administrative removal" that bypass the immigration courts and depend on low-level officers to make sophisticated legal determinations regarding the nature of the conviction. See 8 U.S.C. § 1228(b). This fast-track procedure is essentially a paper process without a formal hearing and corresponding protections.[16] It leaves the noncitizen with only ten days to rebut the government's charge. 8 C.F.R. § 238.1(b)(2). During this process, noncitizens are not even advised that

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[14] *FY 2014 Statistics Yearbook*, at E1, fig. 9.

[15] This group includes noncitizens with conditional lawful permanent residence, who acquired status through less than two years of marriage. 8 U.S.C. § 1228(b)(2)(B).

[16] Accordingly, the noncitizen does not have a right to call witnesses, cross-examine the government's witnesses, or make any sort of in person argument. 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1. A non-lawyer immigration officer plays the roles of both prosecutor and judge, deciding that the noncitizen's conviction qualifies as an aggravated felony based on documentary evidence. 8 C.F.R. §§ 238.1(d); 1003.1(b). And once the Department of Homeland Security (DHS) issues the Final Administrative Removal Order, the noncitizen has no statutory right to take an administrative appeal.

they may challenge the aggravated felony designation.[17]

In 2013, the government removed 9,217 noncitizens through this fast-track-process.[18] This group of detained noncitizens would logically lack access to counsel in even greater numbers because of the limited window—ten days—to defend the charge.[19] Their ability to retain private counsel or secure pro bono representation also depends on regular access to the mail and telephone. Yet, reports show that facilities frequently lack a sufficient number of phones and restrict the number and duration of calls.[20]

Further, the risk of arbitrary enforcement soars with low level officers, neither schooled in law nor precedent, making determinations as to whether specific offenses satisfy § 16(b)'s wide-ranging inquiry. See, *e.g.*, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. 101 (forthcoming 2017). If courts have concluded that they can-

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[17] *See, e.g., Valdiviez-Hernandez* v. *Holder*, 739 F.3d 184, 187 (5th Cir. 2013).

[18] *See* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 Colum. J of Race & L. 1, 3-4 (2014).

[19] *See Accessing Justice* at 410 (noting that while there is no data on the percentage of noncitizens in administrative removal proceedings who are represented, "anecdotal evidence suggests that almost none d[o], despite the likelihood that some ha[ve] valid legal claims"). Indeed, the ten-day window to rebut the aggravated felony charge is not subject to the "prison mailbox rule." *Houston* v. *Lack*, 487 U.S. 266 (1988) (treating the date that pro se prisoner's appeal entered the prison mail system as the filing date); *see In re J-J-*, 21 I. & N. Dec. 976, 982-83 (B.I.A. 1997).

[20] *See A Broken System* at 28.

not apply this direction-less standard consistently, it's hard to see how line officers could do so. *Id.*

* * *

It may be that these difficulties—lack of counsel, detention, language barriers, and fast-track proceedings—would be surmountable in isolation. For example, if noncitizens charged with § 16(b) were not detained, their ability to fight the charges might mitigate against the arbitrary enforcement. But taken together, these structural difficulties compound the problems of notice, arbitrariness, and unintelligibility built-into the § 16 residual clause and demonstrate a need for robust vagueness protections in immigration proceedings. See Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wis. L. Rev. 101, 128-33 (forthcoming 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846572). Accordingly, the Court should declare § 16(b) unconstitutionally vague.

III. INVALIDATING THE § 16 RESIDUAL CLAUSE WOULD NOT FORECLOSE REMOVAL IN MANY INSTANCES GIVEN THE MANY ALTERNATE REMOVAL GROUNDS.

The government in its opening brief warned that "deleterious" consequences would come to pass should this Court invalidate the § 16 residual clause. Br. of U.S. at 52-55. But even assuming that the government's enforcement priorities are relevant to the constitutional inquiry before the Court, the government considerably overstates the potential consequences of a ruling upholding the decision below. Section 16(b) is a catch-all, and the government could still—and already often does—turn to one of many alternative, constitutional grounds of removal. The following sections illustrate that invalidating § 16(b) will not sig-

nificantly inhibit the ability of the government to deport noncitizens. *Amici* merely ask that due process be honored, and that noncitizens be permitted fair opportunities to defend against deportation.

A. The Existence Of Other Aggravated Felony Grounds Subject To Mandatory Removal Would Mitigate The Impacts About Which The Government Complains.

The government protests that invalidating the § 16 residual clause would undo the severe consequences associated with an aggravated felony, including mandatory and permanent removal.[21] But as Respondent has observed, see Br. of Resp't at 58-59, nothing prevents the government from charging these noncitizens with other applicable aggravated felony grounds from the twenty at its disposal, including 18 U.S.C. § 16(a), the "elements clause" of the crime of violence provision.

Courts have found that falling within § 16(a) are some of the most common offenses typically associated with "violence," including:[22]

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[21] A conviction for an aggravated felony renders noncitizens deportable, 8 U.S.C. § 1227(a)(2)(A)(iii); bars many forms of discretionary relief from removal, including asylum, cancellation of removal, and voluntary departure, even where the individual's positive equities, evidence of rehabilitation, and humanitarian, family unity or non-refoulment interests would merit favorable discretion, 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B)(i), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(C); subjects noncitizens to mandatory detention during removal proceedings, 8 U.S.C. § 1226(c); authorizes an abbreviated removal procedure for non-LPRs, 8 U.S.C. § 1228(b); and precludes some noncitizens from qualifying for naturalization, 8 U.S.C. § 1101(f)(8), 1427(a).

[22] In many of these cases, the courts and agency found that the same offense came within both § 16(a) and § 16(b). In other

- *Assault offenses.* See *Roberts* v. *Holder*, 745 F.3d 928, 931 (8th Cir. 2014) (third-degree Minnesota assault); *Camacho-Cruz* v. *Holder*, 621 F.3d 941 (9th Cir. 2010) (Nevada assault with a deadly weapon); *United States* v. *Heron-Salinas*, 566 F.3d 898, 899 (9th Cir. 2009) (California assault with a firearm); *Singh* v. *Holder*, 568 F.3d 525, 529-30 (5th Cir. 2009) (Virginia unlawful wounding).
- *Domestic battery.* See *De Leon Castellanos* v. *Holder*, 652 F.3d 762 (7th Cir. 2011).
- *Assault with intent to commit rape.* See *Matter of Ramon Martinez*, 25 I. & N. Dec. 571 (B.I.A. 2011).
- *Arson.* See *Mbea* v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007).
- *Carjacking.* See *Nieves-Medrano* v. *Holder*, 590 F.3d 1057, 1058 (9th Cir. 2010).
- *Aggravated discharge of a firearm.* See *Quezada-Luna* v. *Gonzales*, 439 F.3d 403, 406 (7th Cir. 2006).
- *Communicating threats/menacing.* See *Arellano Hernandez* v. *Lynch*, 831 F.3d 1127 (9th Cir. 2016) (California making terroristic threats); *Damaso-Mendoza* v. *Holder*, 653 F.3d 1245, 1248 (10th Cir. 2011) (Colorado menacing).
- *Pointing firearm at another.* See *Reyes-Soto* v. *Lynch*, 808 F.3d 369 (8th Cir. 2015).

Thus, the invalidation of § 16(b) will in no way impact the government's ability to remove noncitizens for offenses that contain an *actual element* of force.

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cases, where they found § 16(a) satisfied, courts found it unnecessary to reach the question of § 16(b).

B. Non-Aggravated Felony Removal Grounds Also Remain Readily Available To The Government

Moreover, invalidating the § 16 residual clause would not preclude the government from removing noncitizens under non-aggravated felony grounds. See *Moncrieffe*, 133 S. Ct. at 1692 ("Escaping aggravated felony treatment does not mean escaping deportation . . . [i]t means only avoiding mandatory removal."). Indeed, the government could still remove a noncitizen for a "crime involving moral turpitude" (8 U.S.C. § 1227(a)(2)(A)(i) and (ii)); a firearms offense (8 U.S.C. § 1227(a)(2)(C)), a crime of child abuse, stalking, or violation of a protection order (8 U.S.C. § 1227(a)(2)(E)); any criminal activity that endangers public safety or national security (8 U.S.C. § 1227(a)(4)(A)); or terrorist activities (8 U.S.C. § 1227(a)(4)(B)).

For example, the Third Circuit recently invalidated § 16(b) as unconstitutionally vague, but found that the noncitizen's conviction for reckless aggravated assault is a crime involving moral turpitude. See *Baptiste*, 841 F.3d at 623. Similarly, in *Jimenez-Gonzalez* v. *Mukasey*, the Seventh Circuit suggested that, while reckless discharge of a firearm does not come within § 16(b), it is likely a firearms offense. 548 F.3d 557, 563 (7th Cir. 2008). See also *Quezada-Luna*, 439 F.3d 403 (noting that noncitizen conceded his conviction for aggravated discharge of a firearm qualified as a firearms offense, but contested only that it is a § 16(b) offense); *Idowu* v. *Att'y Gen. of U.S.*, 512 F. App'x 222, 225 (3d Cir. 2013) (not reaching the issue of a crime of violence, but finding that convictions for second-degree eluding conviction and third-degree aggravated assault-bodily injury constituted crimes involving moral turpitude).

The invalidation of § 16(b) means that some removable noncitizens may be eligible to apply for relief from removal because non-aggravated felonies do not *automatically* bar such relief. Relief provisions such as cancellation of removal permit the Attorney General to cancel or waive removal in certain circumstances, but noncitizens must meet various criteria to qualify. See, *e.g.*, 8 U.S.C. §§ 1229b(a)(1)(must have had permanent residence for not less than five years); 1182(h)(1)(B) (must show that noncitizen's removal would cause extreme hardship to citizen or permanent resident family member). Significantly though, the Attorney General retains full discretion to deny these applications for relief based, for example, on the seriousness of the prior criminal record. See, *e.g.*, *In re C-V-T-*, 22 I. & N. Dec. 3342 (B.I.A. 1998). Thus, to the extent that § 16(b)'s invalidation may have an impact on the government's ability to deport noncitizens, it is a "limited one." *Moncrieffe*, 133 S. Ct. at 1692 (quoting *Carachuri-Rosendo*, v. *Holder*, 560 U.S. 563, 581 (2010).

Whether he or she ultimately achieves relief from deportation, each noncitizen deserves an opportunity to challenge his or her removal with notice and under a reliable standard free from arbitrariness. Consistent with this Court's holding in *Johnson*, to forever banish a noncitizen from a country that has been his home under "so shapeless a provision...does not comport with the Constitution's guarantee of due process." 135 S. Ct. at 2560.

CONCLUSION

For the foregoing reasons and those stated by Respondent, the Court should affirm the court of appeals' holding that the Section 16 residual clause is unconstitutionally vague.

Respectfully submitted,

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No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
PETITIONER,

v.

JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RETIRED ARTICLE III JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Interest of amici curiae 1

Introduction and summary 3

Argument:

I. The text of Section 16(b) requires judges to make abstract inquiries into enigmatic features of state criminal offenses 5

II. The indeterminacy of the analysis called for by Section 16's residual clause prevents the consistent and predictable application of the statute that the rule of law requires 8

Conclusion 13

TABLE OF AUTHORITIES

Page(s)

Cases:

Baptiste v. *Attorney General*, 841 F.3d 601 (3d Cir. 2016) 11

Chery v. *Ashcroft*, 347 F.3d 404 (2d Cir. 2003) 10

Golicov v. *Lynch*, 837 F.3d 1065 (10th Cir. 2016) 9

James v. *United States*, 550 U.S. 192 (2007), overruled on other grounds by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015) 6

Johnson v. *United States*, 135 S. Ct. 2551 (2015) ..... *passim*

Skilling v. *United States*, 561 U.S. 358 (2010) 12

United States v. *Alas-Castro*, 184 F.3d 812 (8th Cir. 1999) 10

United States v. *Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009) 10

United States v. *Cortez-Ruiz*, No. 15-CR-00114-LHK, 2016 WL 7034057 (N.D. Cal. Dec. 2, 2016) 11

United States v. *Fish*, 758 F.3d 1 (1st Cir. 2014) 8

United States v. *Galvan-Rodriguez*, 169 F.3d 217 (5th Cir.), cert. denied, 528 U.S. 837 (1999) 9

United States v. *Lanier*, 520 U.S. 259 (1997) 6

United States v. *Mayer*, 560 F.3d 948 (9th Cir.), cert. denied, 558 U.S. 860 (2009) 8

United States v. *Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007) 9

Cases—Continued: Page(s)

United States v. *Tavares*, --- F.3d ---, No. 14-2319, 2016 WL 7011523 (1st Cir. Dec. 1, 2016) 12

United States v. *Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997) 10

Valencia v. *Gonzales*, 439 F.3d 1046 (9th Cir. 2006) 10

Xiong v. *INS*, 173 F.3d 601 (7th Cir. 1999) 10

Constitution and Statutes:

U.S. Const. amend. V ..... *passim*

California Penal Code Section 459 7

Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F) 3

8 U.S.C. 1326 11

18 U.S.C. 16 ..... *passim*

18 U.S.C. 16(a) 7, 12

18 U.S.C. 16(b) ..... *passim*

18 U.S.C. 924(e)(2)(B)(ii) 4

U.S.S.G. § 4B1.2(a)(2) 12

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BRIEF OF RETIRED ARTICLE III JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Amici respectfully submit this brief to the Court in support of the respondent, Mr. James Garcia Dimaya.[1]

INTEREST OF AMICI CURIAE

Amici are retired Article III judges:

- The Honorable Rosemary Barkett, United States Circuit Judge for the Eleventh Circuit Court of Appeals from 1994 to 2013

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

- The Honorable David Coar, United States District Judge for the Northern District of Illinois from 1994 to 2010
- The Honorable William Royal Furgeson Jr., United States District Judge for the Western District of Texas from 1994 to 2008, and United States District Judge for the Northern District of Texas from 2008 to 2013
- The Honorable Nancy Gertner, United States District Judge for the District of Massachusetts from 1994 to 2011
- The Honorable David Hagen, United States District Judge for the District of Nevada from 1993 to 2005
- The Honorable John Martin, United States District Judge for the Southern District of New York from 1990 to 2003
- The Honorable Shira A. Scheindlin, United States District Judge for the Southern District of New York from 1994 to 2016

Though amici are of different backgrounds and judicial philosophies, they are of one mind that a cornerstone of the federal judicial system is the principle that federal criminal statutes should be applied predictably and consistently across factually similar cases and to similarly situated defendants.

Amici's interest in this case arises from their concern that 18 U.S.C. 16(b), like the statutory provision that this Court struck down in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), creates an intolerably high risk of unpredictable and inconsistent results, both in sentencing and, as here, removal determinations.

This infirmity is inherent in the language of 18 U.S.C. 16(b) (Section 16's residual clause), and familiar principles of statutory construction cannot ameliorate it.

Amici respectfully submit that, as former and retired Article III judges, they can lend this Court a unique perspective on the question of whether Section 16's residual clause, including as incorporated into the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F), complies with the requirements of the Due Process Clause of the Constitution of the United States.

INTRODUCTION AND SUMMARY

This case presents the question whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's (INA) provisions governing an alien's removal from the United States, is unconstitutionally vague. Section 16 of Title 18 provides the generic definition of a "crime of violence" for the federal criminal code. Subsection (b), the statute's "residual clause," defines a "crime of violence" to include "any * * * offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

The language of Section 16(b) directs federal judges to analyze whether a state criminal offense "by its nature" meets this definition. This Court has held that the statutory text calls for the court to hypothesize the risk that physical force will be used in the "ordinary case" of the offense, rather than to assess the risk presented by the actual offense conduct of the defendant. The statutory text provides judges with no more guidance than that.

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court considered an analogous challenge to a substantially similar provision in the federal criminal code, the residual clause of the Armed Career Criminal Act (ACCA). The ACCA residual clause at issue in *Johnson* defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year [*i.e.*, a felony] * * * that * * * involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court concluded that the provision violated the Due Process Clause's "prohibition of vagueness in criminal statutes" because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557.

In the opinion below in this case, the Ninth Circuit extended *Johnson*'s holding to the similar language found in the definition of a "crime of violence" in Section 16's residual clause. Pet. App. 8a-9a. The panel majority reasoned that the two features of the ACCA residual clause that this Court held "conspired to make it unconstitutionally vague" applied with equal force to Section 16(b). Pet. App. 9a (quoting *Johnson*, 135 S. Ct. at 2557). The court concluded that, like the ACCA's residual clause, Section 16's residual clause contains no method for determining what the "ordinary case" looks like, or whether the "ordinary case" crosses the threshold of "substantial risk" of physical force. *Id.* at 9a-12a.

Amici share the concern of the court below that Section 16(b) forces federal judges to guess at how any particular state criminal offense is committed in the "ordinary case" and whether that "ordinary case" presents a "substantial risk" that physical force may be

used. Judges must resort to hypothetical abstractions, without either concrete legal elements or specific factual findings to guide them. This inherently indeterminate form of analysis—which more closely resembles the issuance of an advisory opinion than resolution of an actual case or controversy—defies the consistency and predictability that the Due Process Clause requires.

ARGUMENT

I. The Text Of Section 16(b) Requires Judges To Make Abstract Inquiries Into Enigmatic Features Of State Criminal Offenses

Section 16's residual clause defines a "crime of violence" to include any felony offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This Court has held that the statute's plain language dictates that, in determining whether the defendant's offense of conviction satisfies this definition, courts must apply a so-called "ordinary case" approach.

Under the "ordinary case" approach, the question a court ultimately must answer is not whether the defendant's actual offense conduct carried a substantial risk of physical force, but whether the prototypical version of the offense of conviction presents such a risk. See *Johnson* v. *United States*, 135 S. Ct. 2551, 2557

(2015).[2] Evaluating the degree of risk of physical force that the "ordinary case" of a particular offense presents is the ultimate question that Section 16's residual clause always will present the judge. The ambiguity and uncertainty inherent in that evaluation is irreducible, regardless of how much additional guidance this Court offers with respect to the meaning of the statute's discrete terms. See *James* v. *United States*, 550 U.S. 192, 208-209 (2007) (indicating the equivalence of the "by its nature" language and the "ordinary case" approach), overruled on other grounds by *Johnson*, 135 S. Ct. 2551.

Echoing Justice Holmes's time-tested wisdom, this Court in *Johnson* remarked that "the life of the law is experience." 135 S. Ct. at 2560. Section 16's residual clause, however, forces federal judges to make enormously consequential statutory determinations that are neither based on actual, concrete facts presented by the case at hand *nor* within the judge's own direct personal experience. Many statutes require a court to make difficult judgment calls, and it is well-established that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). But Section 16's residual clause does much more than that. It calls

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[2] This Court first described the "ordinary case" approach in *James* v. *United States*, 550 U.S. 192, 208 (2007), overruled on other grounds by *Johnson*, 135 S. Ct. 2551. In *James*, the Court held that the ACCA's residual clause requires a court to determine "whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." 550 U.S. at 208 (emphasis added). The United States' brief (at 20) acknowledges that Section 16(b) likewise "requires a court to assess the risk posed by the ordinary case of a particular offense."

on federal judges to issue something akin to an advisory opinion about a peculiar aspect of a particular state's criminal law without the benefit of a deep—or even a shallow—well of relevant expertise upon which to draw.

Take James Dimaya's case, for example. Had Dimaya committed an offense that has as an essential element the use or threatened use of force, the question of whether Dimaya committed a "crime of violence" would not have been hypothetical, and it would have been easily resolved against Dimaya under Section 16(a). See 18 U.S.C. 16(a) (including as a "crime of violence" "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). Because Dimaya's offense of conviction *did not* include such an element, however, a board of federal administrative judges and, subsequently, a panel of Ninth Circuit judges were forced to answer the hypothetical question of whether violations of California Penal Code Section 459 "ordinarily" are committed in a manner that poses a "substantial risk" of physical force.

It is exceedingly unlikely that any of the administrative or Ninth Circuit judges hearing Dimaya's case had any significant experience—either judicial or otherwise—with violations of California Penal Code Section 459 that could serve as their guide in answering this question. To paraphrase Judge Kozinski's frustrations with Section 16's residual clause, how were the judges in Dimaya's case "supposed to figure out" whether violations of California Penal Code Section 459 ordinarily involve the substantial risk of the use of force: "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"

United States v. *Mayer*, 560 F.3d 948, 952 (9th Cir.) (Kozinski, C.J., dissenting from denial of rehearing en banc), cert. denied, 558 U.S. 860 (2009).

The common denominator of each of the modes of analysis described above is that they call on the judge not to assess a definite set of facts actually before the court, but rather to hypothesize what the average or prototypical version of the defendant's offense of conviction looks like. This is dramatically different from what Article III judges typically are expected to do and are good at, which is to apply federal statutes to concrete facts that are actually before the court. Indeed, as the First Circuit has put it, the inquiry required in applying Section 16's residual clause "seems a better fit for Congress or an administrative agency." *United States* v. *Fish*, 758 F.3d 1, 18 (2014).

II. The Indeterminacy Of The Analysis Called For By Section 16's Residual Clause Prevents The Consistent And Predictable Application Of The Statute That The Rule Of Law Requires

Implicit in Judge Kozinski's frustration with the indeterminacy of Section 16's residual clause is the concern of inconsistent application of the statute. Under the "ordinary case" approach, two federal judges sitting in different circuits might reach diametrically opposed, yet equally defensible, conclusions under Section 16(b) with respect to identical real offense conduct. And this could occur not because the judges disagree on the meaning of the provision's discrete terms or the basic analytical approach that the provision requires, but rather because the judges, relying on little more than imagination, simply have different conceptions of

what constitutes the "ordinary" version of the state law statutory offense of which the defendant was convicted.

The intractable constitutional problem with Section 16's residual clause, then, is not that a federal judge is incapable of reaching a logically defensible determination of whether a given offense "ordinarily" presents a substantial risk of the use of physical force. Rather, the problem is that Section 16(b), like the provision this Court struck down in *Johnson* v. *United States*, "offers no reliable way [for a judge] to choose between" competing conclusions. 135 S. Ct. 2551, 2558 (2015). As this Court recognized in *Johnson*, a statute that forces a judge to resort to "guesswork and intuition" offends due process where the consequences of the judge's decision are so severe, *id.* at 2559, including substantially enhanced mandatory minima and prison sentences in criminal cases and potential deportation in immigration cases. As the Tenth Circuit has stated, "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Golicov* v. *Lynch*, 837 F.3d 1065, 1070 (2016) (quoting *Johnson*, 135 S. Ct. at 2558, and holding 18 U.S.C. 16(b) void for vagueness).

Unsurprisingly, application of Section 16's residual clause has not resulted in the level of predictability, consistency, and uniformity that is so imperative to the rule of law. Take, for example, treatment of state laws criminalizing the unauthorized use of a motor vehicle. The Fifth and Tenth Circuits, hypothesizing about whether the unauthorized use of a vehicle involves a substantial risk of physical harm in the ordinary case, reached opposite conclusions. Compare *United States* v. *Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007), with *United States* v. *Galvan-Rodriguez*, 169 F.3d 217,

219-220 (5th Cir.) (per curiam), cert. denied, 528 U.S. 837 (1999). These courts differed not because one panel was wrong and the other was right. That the Fifth Circuit ten years later reversed course on the motor vehicle offense, see *United States* v. *Armendariz-Moreno*, 571 F.3d 490 (2009) (per curiam), is not proof of Section 16(b)'s constitutionality, but rather reinforces that its "shapeless" text virtually guarantees an irreducible level of "unpredictability and arbitrariness" that the Due Process Clause forbids, *Johnson*, 135 S. Ct. at 2558, 2560.

Similar confusion attends the treatment of laws criminalizing statutory rape. Some courts have deemed statutory rape convictions categorical crimes of violence. In the Second Circuit, for example, the offense is categorically a crime of violence under Section 16(b). See *Chery* v. *Ashcroft*, 347 F.3d 404, 408-409 (2003). So too in the Eighth Circuit and Fifth Circuit. See *United States* v. *Alas-Castro*, 184 F.3d 812, 813 (8th Cir. 1999) (per curiam); *United States* v. *Velazquez-Overa*, 100 F.3d 418, 422-423 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997). The Ninth Circuit and Seventh Circuit, however, have reached the opposite conclusion. See *Valencia* v. *Gonzales*, 439 F.3d 1046, 1049, 1053 (9th Cir. 2006); *Xiong* v. *INS*, 173 F.3d 601, 605-607 (7th Cir. 1999). Once again, the critical point is not that one conclusion is right and the other is wrong. Rather, the critical point is that a criminal statute that carries such profound consequences should not place a federal judge in the position of having to hypothesize whether the "ordinary" version of a state law crime presents the requisite risk of physical force, when the judge's only guideposts to answering the question are "other judicial decisions that can lay no better claim to making

sense of the indeterminacy of the analysis in a principled way." *Baptiste* v. *Attorney General*, 841 F.3d 601, 620 (3d Cir. 2016) (holding 18 U.S.C. 16(b) void for vagueness).

The Solicitor General may be correct in asserting that Section 16(b), as applied to particular types of offenses, has engendered fewer circuit splits than the ACCA's residual clause did in the years before *Johnson*. See U.S. Br. 46 (arguing that Section 16(b) has "not produced pervasive conflicts" in the lower courts). But a statute's constitutionality does not turn upon whether each subsequent court to address a particular question follows the answer supplied by the first court to address it. Instead, the question is whether the statute's language supplies the necessary guidance to the court that is forced to resolve the question *res nova*. Section 16(b) irreparably fails in this regard. As one district judge recently commented in attempting to ascertain whether burglary under Nevada state law was a crime of violence under Section 16(b), "the analysis that the Government asks the Court to perform in the instant case is impossible to do in a way that comports with due process. * * * [T]o make that decision as a matter of first impression, the Court would have to use an unconstitutionally vague standard." *United States* v. *Cortez-Ruiz*, No. 15-CR-00114-LHK, 2016 WL 7034057, at *10 (N.D. Cal. Dec. 2, 2016) (Koh, J.) (dismissing indictment charging illegal reentry under 8 U.S.C. 1326).

As another court has noted in an analogous context, "[i]n a sensible world, Congress and/or the Sentencing Commission would have made a list of state and federal laws deemed to be crimes of violence that warranted the desired penalties and sentencing enhancements."

United States v. *Tavares*, --- F.3d ---, No. 14-2319, 2016 WL 7011523, at *15 (1st Cir. Dec. 1, 2016) (applying similar residual clause of U.S.S.G. § 4B1.2(a)(2)). Because they have not, "[t]he result is a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *Ibid.*

This Court cannot cure the infirmities of Section 16's residual clause by resolving whatever circuit splits presently exist or may arise with respect to particular offenses. Nor can this Court provide a cure by promulgating its own definitive list of state offenses that qualify as crimes of violence under Section 16(b). This Court's approach to the honest services fraud statute in *Skilling* v. *United States*, 561 U.S. 358 (2010), is instructive. In *Skilling*, this Court recognized that the plain language of the honest services statute lacked the precision necessary to punish, consistent with the Due Process Clause, a fiduciary's undisclosed self-dealing. *Id.* at 411 n.44. The Court was able to save the honest services statute from invalidation only because, using accepted tools of statutory construction, the Court was able to conclude that "there is no doubt that Congress intended [the statute] to reach *at least* bribes and kickbacks." *Id.* at 408-409. With respect to Section 16's residual clause, by contrast, neither the statute's text nor its enactment history clearly indicates which criminal offenses Congress had in mind when it drafted the provision. Thus, even assuming that there may be some state law offenses that (though not satisfying Section 16(a)'s definition of "crime of violence") virtually every federal judge would conclude fit within Section 16(b), this does not point the way to a limiting construction that could salvage the provision. Instead, the provision

suffers from a more fundamental problem: the application of a federal criminal statute should not depend upon the outcome of a judge's abstract hypothesis of what the prototypical version of the defendant's offense of conviction looks like.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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